Supreme Court, U.S.
FILED

011318 MAR 05 2002

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No. _____

In the Supreme Court of the United States

BZAPS, INC.,

Petitioner,

vs.

CITY OF MANKATO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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162pp

QUESTIONS PRESENTED

I. May a municipality apply restrictive adult entertainment zoning to a business that presents a one-night dance revue with some partial nudity, when the evidence establishes that such a one-night performance causes no adverse secondary effects?

II. In light of *44 Liquormart v. Rhode Island,* can an absolute prohibition of nude entertainment in a licensed liquor establishment be justified under the First Amendment, in the absence of a showing that the entertainment causes adverse secondary effects?

PARTIES TO THE PROCEEDING

The Petitioner is BZAPS, Inc, a Minnesota corporation. The Respondent is the City of Mankato, Minnesota, a municipal corporation.

All parties to the proceedings below are parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Petitioners informs this Court that BZAPS, Inc. has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

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The opinion of the United States Court of Appeals, reported at 268 F. 3d 603 (8th Cir. 2001), is reproduced at App. A. to this Petition. The unreported order of the Court of Appeals denying BZAPS Petition for Rehearing En Banc is reproduced at App. D. The unreported opinion and order of the United States District Court for the District of Minnesota is reproduced at App. B. The decision of the District Court denying BZAPS Motion for Preliminary Injunction is unreported and reproduced at App. C.

JURISDICTION

The Court of Appeals entered its judgment on October 21, 2001. Petitioner timely filed a Petition for Rehearing en banc, and that Petition was denied on December 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law...prohibiting the free exercise thereof; or abridging the freedom of speech... .

The Fourteenth Amendment to the United States Constitution prohibits any state from depriving "...any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

BZAPS operates Buster's Bar in Mankato, Minnesota pursuant to an on-sale liquor license issued by the City of Mankato. The business is in a B-1 community business district. In 2000 the company contracted with a group known as *Fatal Attraction*, a nationally known male dance review, that performs in a partial state of nudity.[1] The group was hired to give a one-night performance.[2] BZAPS contacted the City to verify that the proposed entertainment program would not violate the City Code. The City's Planning and Zonoing director responded that the show would be prohibited under Mankato City Ordinance Sec. 10.83, *Id.* at A-2.[3]

Two provisions of the Mankato Code of Ordinances are particularly pertinent to the lawsuit. The first is the general adult entertainment zoning ordinance, § 10.83, which permits an "adult use, principal" only in a B-2 general commercial business district or an M-1 light industrial district. This section also prohibits adult entertainment within 350 radial feet of a zoning district in which residential uses are listed as a permitted or conditional use, a licensed day care center, an elementary, junior or senior high school, a public library, a public park, another adult use principal, or any church or church related organization.[4]

The term "adult use-principal" is defined as follows:

> A use, business, or establishment having more than 10% stock in trade or floor area allocated to, or more

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[1] App. at A-1.

[2] *Id.*

[3] *Id.*

[4] *Id.* at E-6 – E-7.

than twenty percent (20%) of its gross receipts derived from, any adult use."[5]

The term "adult use" is defined in Subd. 1A:

Adult uses include adult bookstores, adult motion picture theaters, adult motion picture rental, adult mini-motion picture theaters, adult massage parlors, adult steam room/bathhouse/sauna facilities, adult companionship establishments, adult rap/ conversation parlors, adult health/sports clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotels/motels, adult body painting studios, and other premises, enterprises, establishments, businesses or places open to some or all members of the public, at or in which there is an emphasis on the presentation, display, depiction or description of "specified sexually activities" or "specified anatomical areas" which are capable of being seen by members of the public.[6]

An "adult use cabaret" is defined in Subd. 1F:

A building or portion of a building used for providing dancing or other live entertainment, if such building or portion of a building excludes minors by virtue of age or if such dancing or live entertainment is distinguished or characterized by an emphasis on the presentation, display, depiction or

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[5] *Id.* at E-2.

[6] *Id.* at E-1.

description of "specified sexually activities" or "specified anatomical areas."[7]

The second ordinance amended Chapter 4 of the City Code to prohibit *any* nudity in entertainment programs in businesses licensed to sell alcoholic beverages:

> WHEREAS, adult uses when coupled with the serving of intoxicating liquor, wine or 3.2 malt liquor in public places encourages undesirable behavior and is not in the best interest of the City's public health, safety and general welfare; and
>
> WHEREAS, the City Council of the City of Mankato desires to avoid the potential disturbances and potential adverse effects associated with adult uses on premises holding on-sale liquor, non-intoxicating malt liquor, wine or bottle club licenses; and
>
> WHEREAS, allowing adult uses on premises holding on-sale liquor, non-intoxicating malt liquor, wine or bottle club licenses has a potential for increasing crime and lowering property values and increases the potential for neighborhood blight . . . .[8]

Id. at F-1.

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[7] *Id.* at E-3.

[8] *Id.* The record clearly demonstrates that not one of these "whereas" clauses is supported by evidence in the case of a "single-night" dance revue. Indeed, the evidence makes it clear that the opposite is true, and that BZAPS' proposed performance would *not* cause problems.

The substantive prohibition of the newly enacted ordinance is the following:

> Section 4.09. Adult uses.
>
> Subdivision 1. Prohibition. It is unlawful for the holder of an on-sale liquor, non-intoxicating malt liquor, wine, or bottle club license issued under this Chapter or for any manager, officer, agent, servant or employee of such license holder to exhibit, allow or permit on the licensed premises any adult use defined in Section 10.83, Subd. 1 of this code.

Id. at F-2.

Critical to this case is the City's construction and enforcement of its ordinance. Any business that uses more than 10% of its floor area, or derives more than 20% of its gross revenue from, any adult use is an "adult use, principal" establishment. According to the City's Planning and Zoning Director, the City applies those provisions to each day's operation of a business; in other words, a business can be a non-adult use 364 days a year, and by having one stage show with some partial nudity on one day (as BZAPS desired to do), it becomes an "adult use, principal" on that day.[9] And an adult use, principal is banned in a B-1 business community zoning district.

BZAPS brought suit in the District Court under 42 U.S.C. § 1983. On November 30, 1998, BZAPS moved for a preliminary injunction to enjoin the enforcement of ordinance No. 10.83 against it, insofar as the ordinance would prohibit a

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[9] App. at A-3.

one night performance of *Fatal Attraction.* The motion was denied by the District Court.[10]

On July 28, 1999, BZAPS took the deposition of Paul Vogel, Planning and Zoning Administrator for the City and the drafter of the Mankato Adult Entertainment Zoning Ordinance, § 10.83. Vogel admitted that the city, when it enacted the adult entertainment zoning ordinance, considered absolutely no evidence whatsoever that a single night's performance of *Fatal Attraction* would cause any adverse secondary effects of any kind. He testified that in adopting its adult entertainment ordinance in 1996, the City relied upon adult entertainment studies from St. Paul, Minnesota, Indianapolis, Indiana, and Rochester, Minnesota.[11] Vogel admitted that he was not familiar with any evidence from any jurisdiction anywhere in America which would suggest that a single sale of a *Hustler* magazine in a neighborhood convenience store would cause any secondary effects, such an increase in crime or a decline in property values. He further admitted that he was unfamiliar with any evidence from anywhere in America that suggested that a single showing of an adults-only film at a theater which showed general release motion pictures the remaining 364 days a year would cause any adverse secondary effects. He also testified that he was unfamiliar with any evidence from any jurisdiction anywhere that would suggest that the single showing of a live nude dance performance at a venue which otherwise did not feature adult entertainment, would cause any adverse secondary effects. Vogel was asked if he thought a convenience store would cause property values in the neighborhood to decline and crime to increase if on a single day, it were to gain 21% of its sales from *Hustler* magazines? His response: "No."[12]

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[10] *Id.* at C-1 – C-9.

[11] Petitioner's Appendix at G-5, G-8 – G-9.

[12] Petitioner's Appendix at G-14.

In addition to testifying that the City had no evidence from anywhere that BZAPS' proposed one-night dance revue would lead to any adverse secondary effects, and that in his personal belief that it would not, Vogel stated that Mankato's own experience was consistent with that testimony. He said that no adverse secondary effects had occurred with single-night performances of nude dance entertainment, and even with nude dance entertainment on a regular and permanent basis. He testified that the existing adult uses at the time the adult entertainment ordinance was enacted were *Mettler's* in downtown Mankato, *Risque's* on Madison Avenue, and the *Adult Book & Cinema* located on North Riverfront Drive.[13] He said he was not surprised that his own city's police statistics demonstrated that there had been fewer calls to the single bar featuring adult entertainment than to any of the other downtown bars, that he did not believe that such a bar generated anymore crime than any other bar in the city, and that he had no evidence that property values surrounding that bar were affected any differently than property values around any other commercial establishment. He conceded that at least one of the reasons that in adopting the adult entertainment zoning ordinance the City did not provide for the amortization of non-conforming uses was that the City had no evidence the existing adult uses caused any adverse secondary effects.[14]

Vogel further admitted that the City had direct evidence that a single night's performance of a group such as *Fatal Attraction* does not cause any adverse secondary effects. He said that a male dance revue known as *The Chippendales* had

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[13] App. at G-15.

[14] *Id.* at G-19 – G-20. Examples of municipal ordinances that require the amortization of non-conforming adult uses can be found in *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1981) and *Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1994).

periodically performed in one-night performances at the Kato Ballroom, in a zone where adult entertainment was prohibited.[15] He acknowledged that there was absolutely no evidence that these one-night performances by a dance troupe like *Fatal Attraction* had generated any law enforcement problems, decline in property values, or any other adverse secondary effects.[16]

The affidavit of Patricia DaCunha, filed in opposition to the City's motion for summary judgment, points out that *The Chippendales* made a one-day appearance at the Historic State Theater in Minneapolis on November 1, 1995.[17] Ms. DaCunha specifically investigated whether any evidence existed that the one-night performance had caused any adverse secondary effects, either at the Historic State Theater in the surrounding area, and found that it did not. The exhibits to her affidavit plainly indicate that no police calls to the State Theater occurred on the night of *The Chippendales*' performance, and that police calls for the year were indistinguishable from that of the Historic Orpheum Theater one block away, which featured no adult entertainment. Property value figures from the State Theater, comparing property values of similarly located property, indicating essentially no difference.[18]

On October 14, 1999, when the City enacted its ordinance prohibiting "adult uses" from ever performing in a venue licensed to sell liquor, the Council did so not only

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[15] App. at G-21.

[16] *Id.* at G-21 – G-22.

[17] *Id.* at I-2. The Historic State Theater is not an adult entertainment establishment, as evidenced by the program attached to her affidavit. Programs at the State Theater include such performances as *Joseph and the Amazing Technicolor Dreamcoat,* comic singer "Weird Al Yankovich" and vocalist Lyle Lovett.

[18] App. at K-1 – K-25.

without evidence of adverse secondary effects, but with uncontradicted evidence that there were no such secondary effects. At the Council meeting, BZAPS presented copies of Mr. Vogel's deposition, in which he conceded that the city had absolutely no evidence that a one-night performance of a semi-nude dance entertainment at a venue otherwise featuring entertainment of a non-sexual nature would cause adverse secondary effects; in which he conceded his personal belief that no such effects occurred; and in which he conceded that the city's own experience had been that no such secondary effects had occurred.[19]

One Council member was very disturbed about the absence of any evidence to document the concerns contained in the "whereas" clauses of the proposed ordinance, and moved to postpone voting until the staff could provide evidence to support those conclusions. Two Council members rejected the suggestion, and affirmatively stated that they would support the ordinance *based upon their objection to the content of adult entertainment.* The ordinance was approved.[20]

On August 14, 2000, the District Court granted summary judgment for the City, upholding both ordinances.[21] That judgment was affirmed by the Court of Appeals on October 21st.[22] Rehearing was denied on December 5th.[23]

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[19] Transcript of October 11, 1999, pp. 1-3, App. at H-1 – H-14.

[20] *Id.* at H-. While BZAPS readily concedes that the illicit motive of two Council members would not justify a finding that the ordinance was unconstitutional, the statements of these two members, the refusal of the Council to require studies and the evidence in opposition to the ordinance makes it clear that the motive of the entire Council was illicit. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

[21] App. B at B-17.

[22] App. A at A-1.

[23] App. D at D-1.

REASONS FOR GRANTING THE WRIT

In deciding that a municipality can impose restrictive zoning against BZAPS, the Court of Appeals ignored the landmark decision of this Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) that evidence is required to support such a restriction. The Eighth Circuit's decision is also squarely at odds with the decision of the Court of Appeals for the Ninth Circuit in *Tollis, Inc. v. San Bernadino County*, 827 F.2d 1329 (9th Cir. 1987). And the decision is in direct conflict with another decision of the Ninth Circuit, *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), now awaiting decision in this Court.[24]

Additionally, in holding that the absolute ban on a single performance of a dance revue with partial nudity – a revue that is protected under the First Amendment – the Court refused to follow this Court's holding in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) that the Twenty-first Amendment does not override constitutional protections in the Bill of Rights.

Certiorari is required. The conflict among the circuits on this issue must be resolved. Cities in every federal circuit must have the same constitutional hurdles to overcome when restricting First Amendment rights. And the Court must again remind cities that the Twenty-first Amendment is not a license for suppression of speech.

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[24] No. 00-799. The case was argued on December 4, 2001.

I. There is an irreconcilable conflict among the circuits on what evidence is necessary to support a prohibition of constitutionally protected expression.

When the Ninth Circuit decided *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1985), it said that a municipality cannot rely on studies conducted by another city that adult theaters cause adverse secondary effects in the areas where they are located. The City had argued that it could rely on studies done by Seattle, its much larger neighbor. The Ninth Circuit rejected that argument:

> . . . Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton. The studies done by Detroit on the problems of concentrating adult uses are simply not relevant to the concerns of the Renton ordinance – the proximity of adult theaters to certain other uses. We do not say that Renton cannot use the experiences of other cities as part of the relevant evidence upon which to base its actions, but in this case those experiences simply are not sufficient to sustain Renton's burden of showing a significant governmental interest… .
>
> 748 F.2d at 537.

As the Ninth Circuit put it, " This court and the Supreme Court require Renton to justify its ordinance in the context of *Renton's* problems – not Seattle's or Detroit's problems.[25] *Id.*

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[25] The statement was referring to the affidavits in Detroit that were mentioned in this Court's opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

That decision was in conflict with the decision of the Seventh Circuit in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980):

> Even though here, unlike in *Young*, the city has not demonstrated a past history of congregated adult uses causing neighborhood deterioration, we agree with the district court that a city need not await deterioration in order to act. A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action. There is no reason to believe that the effect of congregated adult uses in Peoria is likely to be different than the effect of such congregations in Detroit.
>
> 619 F.2d at 1211.

In *City of Renton* this Court resolved the conflict, holding that a city is not constitutionally required to conduct its own studies. However, this Court made it clear that evidence *is* required before speech can be prohibited:

> . . . The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.
>
> 475 U.S. at 1-52.

The Eighth Circuit made this statement:

> In the present case, however, the city relied upon evidence directly relating to the adverse effects of nude dancing, and could thus reasonably conclude that a one-night performance of nude dancing might have some similar effects.[26]

But in making that statement, the Eighth Circuit did exactly what the City Council did. They both chose to ignore the uncontradicted evidence, much of it supplied by the City's head planning and zoning official, that the opposite was true. There is no construction of that evidence that would allow the City to reasonably believe that enforcing these ordinances against BZAPS would further any substantial governmental interest.

In *Tollis, Inc. v. San Bernadino County*, 827 F.2d 1329 (9th Cir. 1987), a challenge was brought against a definition in an adult business zoning ordinance that made any business an "adult theater" if it showed a *single* sexually explicit film only one time in a year. The Ninth Circuit said this approach failed to correctly apply the decision in *Renton*:

> Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The County has thus failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time, is sufficiently " 'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects." *Renton,* 106 S.Ct. at 931 . . . .
>
> 827 F.2d at 1333.

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[26] App. at A-6.

The *Tollis* opinion included a statement that is directly relevant to this case:

> . . . [I]t is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects.

Id.

The conflict is also clear in the opinion in *Alameda Books*. The City of Los Angeles had an adult entertainment zoning ordinance that prohibited adult businesses in certain areas. Relying on a study that a concentration of adult businesses causes adverse secondary effects, the City amended its ordinance to prohibit so-called "adult arcades."[27] The Ninth Circuit said the City was not entitled to rely on a study that had nothing to do with the problem it was addressing:

> Like the county in *Tollis,* Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study. As the above discussion indicates, the evidence the City has "relied" upon – the 1977 Study – contains no findings that an individual combination bookstore/arcade produces any of the increased crime the Study found resulting from a concentration of adult businesses. Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects. *See also Acorn Invs., Inc. v. City*

[27] These are retail outlets that provide more that one kind of adult entertainment in a single building.

> *of Seattle,* 887 F.2d 219, 222 (9th Cir.1989) (holding unconstitutional under *Renton* a city licensing fee for specific types of adult theaters because the City had "failed to prove" that these theaters were responsible for fostering the alleged secondary effects – criminal activity – that were given as justification for the licensing fee); *Turner Broad. Sys., Inc. v. FCC (Turner II),* 520 U.S. 180, 211, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (holding that in reviewing content-neutral regulations burdening speech under an intermediate scrutiny standard, the question for the courts "is whether the legislative conclusion was reasonable and supported by *substantial evidence in the record before [the legislative body]* ") (emphasis added).
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> 222 F.3d at 725-26.

The Eighth Circuit expressly recognized the conflict between its decision and the opinions in *Alamdea Books* and *Tollis*, and said that the Ninth Circuit's approach in each of these cases was incorrect:

> We think the Ninth Circuit has overstated the requirements of *Renton.* We believe, instead, that once a city has validly forbidden adult uses within a particular area, it may enforce that ordinance against all adult uses in that area without showing that a particular use will produce secondary effects.
>
> App. at A-6.

The situation considered by the Ninth Circuit – a single showing of an adult film in an entire year – is the identical situation in this case. And the opinion of the City's planning

and zoning expert is consistent with the Ninth Circuit's opinion that a single performance of a dance revue could cause any meaningful adverse secondary effects. Thus, it is impossible to reconcile the opinions of these two circuits, and that task falls to this Court.

In addition to the obvious conflict between the Eighth Circuit and the Ninth Circuit, the Eighth Circuit's decision in the instant case is in further conflict with both the decisions of the Eleventh Circuit in *Flanigan's Enterprises v. Fulton County Ga.*, 242 F. 3d 976 (11th Cir. 2001), and *Schultz v. City of Cumberland*, 228 F. 3d 831 (7th Cir. 2000). In *Flanigan's Enterprises*, the Eleventh Circuit held that where, as here, the evidence available to the enacting local unit of government indicated that the adult uses sought to be regulated had a long history of causing no adverse secondary effects, content-based regulation was constitutionally impermissible under *Renton*. In *Schultz*, the Seventh Circuit held that a definition of adult entertainment defining a sexually oriented business as one which "regularly features" sexually explicit entertainment, must be construed to read "always features" such entertainment in order to avoid unconstitutional overbreadth. Plainly, under that standard, a "features adult entertainment on one occasion" definition plainly would fail the test of overbreadth. Granting of certiorari in the instant case is plainly necessary to resolve these conflicts among the circuits.

However, even more significant than resolving the conflict among the circuits is the correction of the fundamental havoc to First Amendment jurisprudence which the Eighth Circuit decision plainly wreaks. Rather than requiring that adult entertainment restrictions be "narrowly tailored" to those uses actually shown to cause adverse secondary effects, as required by this Court in *Renton*, the Eighth Circuit permits regulation of adult entertainment, defined solely by content, not on the basis of any evidence

whatsoever that the entertainment being regulated, namely the single showing of a sexually explicit performance, will in fact cause adverse secondary effects; but rather based solely upon the administrative inconvenience to municipalities in proving how much adult entertainment would in fact cause such effects. To permit such a leap would be to remove all remnants of the secondary effects test and to authorize purely content-based censorship.[28]

II. *44 Liquormart, Inc. v. Rhode Island* does not allow the prohibition of constitutionally protected expression in licensed alcoholic beverage establishments, without a showing that the expression causes criminal behavior or adverse secondary effects.

Prior to this decision of this Court in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996), an ordinance such as Mankato City Ordinance Sec. 4.09(1), which prohibits the holder of a liquor license from allowing an adult use, as defined in the zoning code, would have been upheld under the decision of this Court in *California v. LaRue,* 409 U.S. 109 (1972). However, in *44 Liquormart*, this Court overruled *California v. LaRue,* to the extent that it relied upon the 21st Amendment's grant of authority to the states to regulate liquor.

Nonetheless, the Eighth Circuit in the instant case upheld the validity of Sec. 4.09, notwithstanding *44 Liquormart*, because this Court in that case declared that the outcome in

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[28] Obviously, under the standards adopted by the Eighth Circuit, a convenience store which sells a single issue of Playboy or a major hotel chain which offers any sexually explicit fare from cable television in its hotel rooms will be subject to adult entertainment zoning regulation, despite the fact that no one seriously contends that such land uses cause adverse secondary effects.

LaRue would have been the same without reliance upon the 21st Amendment because "[e]ntirely apart from the 21st Amendment, the state has ample power to prohibit the sale of alcoholic beverages in appropriate locations." 517 U.S. at 515, cited in Appendix at A-8. However, what the Eighth Circuit ignores is that in advancing the proposition that the state has ample authority to regulate the sale of alcoholic beverage in appropriate locations, this Court cited two cases, *Young v. American Mini Theaters,* supra, which upheld the original adult entertainment zoning ordinance in Detroit, on the basis of a "secondary effects" theory, and *Barnes v. Glen Theaters, Inc.,* 501 U.S. 560, (1991), upholding the validity of Indiana's public nudity statute in a fractured opinion, otherwise held by the Eighth Circuit to stand for the proposition that public nudity regulations are justified under a "secondary effects" theory. See *Farkas v. Miller,* 151 F. 3d 900 (8th Cir. 1998).

The impact of *California v. LaRue*, after *44 Liquormart,* is obviously this: to the extent that regulations of adult entertainment are to be justified as liquor regulations, they must be justified under a "secondary effects" theory, much as zoning and public nudity regulations. Where even regulations of liquor are not narrowly tailored to those uses shown to cause adverse secondary effects, the liquor regulations will plainly be invalidated. See for example, *Lounge Management, Ltd v. Town of Trenton*, 29 Wis. 2d 13, 580 N.W. 2d 156 (1998), cert. denied, ___U.S.___ 119 S. Ct. 511 (1998), in which the prohibition of nudity in licensed establishments is invalidated as not being narrowly tailored to uses shown to cause adverse secondary effects, even if it had been authoritatively construed to prohibit only live nudity in licensed liquor establishments, and *Flanigan's Enterprises v. Fulton County Ga.,* supra, 242 F. 3d 976 (11th Cir. 2001), invalidating a nudity prohibition in licensed liquor

establishments, where available evidence indicated an absence of adverse secondary effects.

However, most compelling in this regard is *LSO, Ltd, v. Stroh,* 205 F. 3d 1146 (9th Cir. 2000), in which the court invalidated applications of the very regulations upheld in *LaRue* to an annual erotic art exhibition and trade show, in a venue which had a liquor license. Of particular interest is that not only did the court hold the regulations invalid where no secondary effects could be demonstrated, it held that the law on the subject was so well established that the liquor officials who attempted to implement such regulations did not qualify for good faith immunity from damages.

Plainly, the grant of certiorari in the instant case will permit the court directly to answer the questions posed and not entirely answered in *44 Liquormart,* as to the extent of state's ability to regulate sexually explicit entertainment, without a 21st Amendment justification, in the absence of secondary effects. The grant of certiorari will plainly permit the Court to resolve the conflict between the Eighth Circuit on the one hand, and the Supreme Court of Wisconsin, the Eleventh Circuit and the Ninth Circuit on the other hand.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be in all respects, granted.

Dated: March 5, 2002

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3214

BZAPS, Inc., Doing Business as Buster's Bar,	*
Appellant,	*
v.	* Appeal from the United States District Court for the
City of Mankato,	* District of Minnesota.
Appellee.	*

Submitted: May 17, 2001

Filed: October 12, 2001

Before MORRIS SHEPPARD ARNOLD and BYE, Circuit Judges, and GAITAN,[1] District Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

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[1] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

BZAPS, Inc., contracted with a group known as "Fatal Attraction," a male dance revue that performs in various states of nudity, to perform for one night at Buster's Bar, owned by BZAPS in Mankato, Minnesota. When a BZAPS representative contacted the city planning director regarding the permissibility of this performance, the planning director stated that such a performance would violate Mankato City Ordinance § 10.83(4)(A), which allows adult uses only in zoning areas different from the one in which Buster's Bar is located.

BZAPS sued the city, claiming that the first amendment forbids the application of § 10.83 to a one-night performance. After the district court[2] denied a request by BZAPS for a preliminary injunction, the city enacted Mankato City Ordinance § 4.09(1), banning adult uses in any establishment with a liquor license. BZAPS then amended its complaint to challenge the constitutionality of § 4.09(1) on its face and as applied to a one-night performance. The district court granted summary judgment to the city. We affirm.

I.

Under § 10.83(4)(A), the city prescribes the permissible locations of "adult use, principal," establishments. The B-1 "community business district," where Buster's Bar is located, is not included in the list of permissible locations. *See id.* The ordinance also requires, *see* § 10.83(4)(B), such establishments to be at least 350 feet from residential districts, day care centers, schools, libraries, parks, churches, and other "adult use, principal," establishments. The ordinance, *see* § 10.83(1)(A), defines an "adult use" as one "in which there is an emphasis on the presentation, display, depiction or description of 'specified sexual activities' or 'specified

[2] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

anatomical areas.'" "Specified sexual activities" and "specified anatomical areas" are enumerated in some detail. *See* § 10.83(1)(A)(1), § 10.83(1)(A)(2).

The ordinance, *see* § 10.83(1)(C), defines an "adult use, principal," establishment as one "having more than 10% of its stock in trade or floor area allocated to, or more than twenty percent (20%) of its gross receipts derived from, any adult use." The city contends that this standard applies on a per-day basis, and that a one-night adult performance using more than 10% of Buster's floor space would cause it to become an "adult use, principal," establishment for that night, thus violating § 10.83(4)(A). BZAPS contends that this interpretation of § 10.83 violates the first amendment.

The Supreme Court has frequently recognized that nude dancing is protected by the first amendment, *see, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion), *see also id.* at 581 (opinion of Souter, J.) and *id.* at 593 (opinion of White, J.), but the Court has nevertheless allowed local governments to use their zoning powers to limit the location of adult establishments. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54-55 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976). In upholding the zoning ordinance in *Renton,* the Court concluded that an ordinance limiting the location of adult establishments is proper so long as it is constructed without reference to content, *see Renton,* 475 U.S. at 48, and is designed to promote a substantial governmental interest and allows reasonable alternative avenues for communication, *see id.* at 50. *See also ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413, 1416 (8th Cir. 1994), *cert. denied,* 513 U.S. 1017 (1994).

On its face, § 10.83 differs in no relevant respect from the ordinance upheld in *Renton,* 475 U.S. at 44. We see no evidence that the enactment of the ordinance was motivated by a desire to suppress the content of nude dancing, and the city

indicates that its concern was with the secondary effects of the dancing. *See* § 10.83(2). The ordinance, *see* § 10.83(4), makes no attempt, furthermore, to change or ban a specific message but merely regulates the location where the message may be expressed. *See Renton,* 475 U.S. at 48. The ordinance also allows for reasonable alternative avenues for communication, *see id.* at 50, for it appears that there are numerous locations within Mankato that remain available for adult uses. Indeed, the Mankato ordinance appears less restrictive than the ordinance upheld in *Renton,* since § 10.83 prevents adult uses within 350 feet of certain other uses, in contrast to the 1,000-foot barrier imposed in *Renton,* 475 U.S. at 44.

BZAPS contends, however, that the city has failed to show that § 10.83 is reasonably related to the promotion of a substantial governmental interest. The city maintains that it enacted the ordinance because of its concern about the secondary effects of nude dancing establishments, such as crime and decreasing property values in the surrounding areas. Although the city admits that it has no direct evidence of these effects occurring within Mankato, when enacting the ordinance the city relied upon studies previously conducted by the cities of Indianapolis, Indiana, and St. Paul and Rochester, Minnesota. These studies show a connection between adult entertainment establishments and adverse secondary effects of the type that concern the city.

It is now beyond question that a city may regulate the location of adult entertainment when motivated by the secondary effects of that entertainment. *See Renton,* 475 U.S. at 50-51. A city need not conduct its own study regarding these effects, moreover, but may rely on evidence "already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *id.* at 51-52; *see also ILQ,* 25 F.3d at 1417-18. The city's reliance on the studies of other

cities was a sufficient basis to enact § 10.83, because the studies relied upon are reasonably related to the city's concerns about adult entertainment.

II.

BZAPS maintains that even if the evidence relied upon by the city is sufficient to justify § 10.83 on its face, it is not sufficient to justify the application of § 10.83 specifically to BZAPS. In particular, BZAPS maintains that the studies do not indicate a causal relationship between a one-night performance of the type it proposes to hold at Buster's Bar and the secondary effects motivating the enactment of § 10.83. BZAPS also contends that identical one-night adult shows have previously been held in Mankato without such secondary effects.

Once a city has decided to regulate adult entertainment to prevent its secondary effects, however, the city is not required to prove that a particular adult use creates secondary effects before regulating that use, so long as the city reasonably believes that the use is related to other uses that have been shown to cause secondary effects. *See Holmberg v. City of Ramsey,* 12 F.3d 140, 143 (8th Cir. 1993), cert. denied, 513 U.S. 810 (1994). BZAPS's proposed use differs little from many other adult performances. The fact that this performance is to last for only one night as opposed to what occurs in a so-called "strip club" that features an identical performance on a nightly basis does not preclude the city from reasonably believing that the uses are related.

We believe that *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted,* 121 S. Ct. 1223 (2001), and *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir.1987), cases on which BZAPS relies heavily, are not helpful to it. In *Alameda Books,* 222 F.3d at 721, the city of Los Angeles attempted to regulate a combination adult bookstore/arcade under an ordinance that

would permit either an adult bookstore or an adult arcade, but not both, at one location. The Ninth Circuit invalidated the ordinance, finding that the city had no evidence from which it could reasonably conclude that a combination bookstore/ arcade would precipitate greater secondary effects than an individual bookstore or arcade would. *See id.* at 728. In the present case, however, the city relied upon evidence directly relating to the adverse effects of nude dancing, and could thus reasonably conclude that a one-night performance of nude dancing might have some similar effects.

In *Tollis*, 827 F.2d at 1333, the Ninth Circuit invalidated a zoning ordinance defining an adult theater as any theater showing a single adult film. The court determined, *see id.*, that the county had no evidence to indicate that a single showing of an adult film would have any secondary effects. The court opined further, *id.*, that it did not "see how the County could make such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects." The court therefore held, *see id.*, that the ordinance failed to meet the requirement of *Renton*, 475 U.S. at 52, that such an ordinance must be "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects."

We think that the Ninth Circuit has overstated the requirements of *Renton*. We believe, instead, that once a city has validly forbidden adult uses within a particular area, it may enforce that ordinance against all adult uses in that area without showing that a particular use will produce secondary effects. *Renton*, 475 U.S. at 52-53, does not require cities to discriminate among adult uses; it merely requires that laws of this type not sweep so broadly as to regulate establishments that never present adult entertainment, such as the ordinance banning all live entertainment struck down in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). The Mankato ordinance is narrowly tailored to apply solely to a

"category of [establishments] shown to produce the unwanted secondary effects," *Renton,* 475 U.S. at 52, namely, establishments that present adult entertainment. If we were to accept BZAPS's argument, a city would have the burden of showing precisely how many adult performances were capable of producing an unacceptable level of antisocial activity before the city could regulate those performances. We are satisfied that neither the first amendment nor Supreme Court precedent requires a city to do the impossible.

III.

BZAPS also challenges the constitutionality of Mankato City Ordinance § 4.09(1), which prohibits the holder of a liquor license from allowing an adult use, as defined by § 10.83(1)(A), within the license holder's establishment. Prior to the Supreme Court's ruling in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996), § 4.09(1) would clearly have been upheld under the rule of *California v. LaRue,* 409 U.S. 109 (1972). In *LaRue,* 409 U.S. at 118-19, the Supreme Court held that a California law forbidding certain adult activities in bars was constitutional because of the state's power to govern liquor sales under the twenty-first amendment and also because the state's concern with the mix of alcohol and adult activity was a rational use of the state's police power. As the district court in BZAPS's case correctly pointed out, "there are no material differences between California's regulatory system and Mankato's liquor ordinance."

BZAPS contends, however, that *44 Liquormart* undoes the precedential effect of *LaRue.* We disagree. While the Court in *44 Liquormart* rejected *LaRue's* reliance on the twenty-first amendment as a basis for its decision, *see 44 Liquormart,* 517 U.S. at 516, it specifically declined to disturb *LaRue's* holding. *See id.* The Court declared that the outcome in *LaRue* would have been the same without reliance

on the twenty-first amendment, and that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations," *id.* at 515.

Because the Supreme Court has refused to reject the holding of *LaRue,* the case remains precedent that we are obliged to apply to similar cases. *See Groninger v. Davison,* 364 F.2d 638, 642 (8th Cir. 1966). As noted earlier, *LaRue* and the present case are virtually indistinguishable. The city's concern about the combination of alcohol and adult entertainment is not irrational, and the city is thus entitled under its police power to prohibit the sale of alcohol in a location that features adult entertainment. We therefore hold that § 4.09 is constitutional both on its face and as applied to BZAPS.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

BYE, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's conclusion about the constitutionality of Mankato City Ordinance § 4.09. I therefore concur in the result, which denies the injunctive relief sought by BZAPS. But I disagree with the majority's analysis of Mankato City Ordinance § 10.83. BZAPS initiated its challenge to § 10.83 eleven months before Mankato passed § 4.09. Because I believe we may liberally construe BZAPS's prayer for relief as asking for damages for the constitutional violation that occurred during that time period, I dissent from parts I and II of the majority opinion.

Unlike § 4.09, which addresses Mankato's concern about the harmful secondary effects of combining alcohol and adult entertainment, § 10.83 was enacted to address the city's concern about the harmful secondary effects of adult businesses, period. In City of Renton v. Playtime Theatres, Inc., the Supreme Court upheld a similar municipal ordinance

because it was "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects." 475 U.S. 41, 52 (1986). Mankato City Ordinance § 10.83 might likewise be "narrowly tailored" if it applied only to a category of businesses which, on an ongoing basis, have "more than 10% of [their] stock in trade or floor area allocated to, or more than twenty percent (20%) of its gross receipts derived from, any adult use." Mankato City Ordinance § 10.83(1)(C).

Mankato contends, however, that its ordinance applies on a per-day basis. By applying the ordinance in that manner, Mankato targets the content of a single adult performance—rather than a category of adult businesses shown to produce harmful secondary effects—without presenting evidence that a single adult performance has any harmful secondary effects on the community.

In Tollis Inc. v. San Bernardino County, the Ninth Circuit struck down an ordinance that San Bernardino County construed in such a way that a single showing of adult entertainment rendered a business "adult oriented" as defined by the ordinance. 827 F.2d 1329, 1333 (9th Cir. 1987). The court held that the County failed to show the ordinance was "sufficiently 'narrowly tailored' to affect only that category of businesses shown to produce the harmful secondary effects" because the County had "presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community." Id.

I fully agree with Tollis, and believe it to be entirely consistent with the Supreme Court's decision in Renton. Mankato presented no evidence that a single showing of an adult performance puts a business in that category of businesses shown to produce harmful secondary effects. As a result, the city failed to show that the ordinance, as applied on a per-day basis, was narrowly tailored under Renton.

I read the majority as rejecting Tollis because, if we require evidence that a single performance causes adverse secondary effects, then we will impose the impossible burden on cities of showing the precise number of performances that will produce harmful secondary effects before it can regulate any adult performances. If the majority is rejecting Tollis on the ground that its analysis would inevitably require courts to determine how many adult performances are too many, I respectfully disagree.

Under Renton, Mankato absolutely has the burden of narrowly tailoring its ordinance. An ordinance that allows the city to regulate the content of a single performance, without presenting evidence that a single performance causes adverse secondary effects, is not narrowly tailored. A per-day application of § 10.83 necessarily raises the specter of impermissible content-based regulation of the expressive content of the single performance itself, rather than the permissible regulation of a category of business shown to produce harmful secondary effects.

Clearly, ordinances can be drafted in such away that courts will not be required to determine when the number of adult performances — presented by an otherwise "non-adult oriented" business — crosses the constitutional line. For example, § 10.83 could be saved simply by applying its "10% floor space/20% gross receipts" standard on something other than a per-day basis, perhaps quarterly or annually. Requiring Mankato to narrowly tailor this ordinance clearly does not impose an impossible burden, when the ordinance itself suggests an entirely reasonable, and possible, constitutional interpretation.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BZAPS, Inc., d/b/a Buster's Bar, Civ. File No. 98-2588

Plaintiff,

v. **MEMORANDUM AND ORDER**

City of Mankato,

Defendant.

This matter is before the Court upon cross-motions for summary judgment brought by Plaintiff BZAPS, Inc. and Defendant City of Mankato. For the following reasons, the Court denies Plaintiff's motion and grants Defendant's in its entirety.

BACKGROUND

Plaintiff BZAPS, Inc. does business as Buster's Bar ("Buster's") in the B-1 Community Business District in the City of Mankato ("the City"). Because Buster's is classified as a "drinking establishment" under the zoning regulations, it operates as a conditional use in the B-1 district.

This case stems from Buster's plan to host a male dance review called "Fatal Attraction" that includes male dancers performing in various stages of nudity. In early November 1998, Allan Torkelson, the owner of Buster's, contacted Paul Vogel, the City's zoning administrator, to inquire about the possibility of periodic one-night performance at Buster's by Fatal Attraction. Vogel opined that a performance which included activity defined as an "adult use" by the Mankato

City Code would subject Buster's to legal action. Eileen Wells, the Mankato City Attorney, later informed Buster's that even a one-night performance would violate the City's zoning ordinances if Buster's derived twenty percent of its revenue that day from the performance. (See Amended Complaint ¶¶ 17-18).

The Mankato City Code restricts "Adult Uses-Principal" enterprises to the B-2 General Commercial Business District and the M-1 Light Industrial District. Section 10.83 defines an adult use-principal as a "use, business or establishment having more than 10% of its stock in trade or floor area allocated to, or more than 20% of its gross receipts derived from any adult use." Mankato City Code § 10.83. The term "adult use" is given meaning by subdivision 1A:

> Adult uses include adult bookstores, adult motion picture theaters, adult motion picture rental, adult mini-motion picture theaters, adult massage parlors, adult steam room/bathhouse/sauna facilities, adult companionship establishments, adult rap/ conversation parlors, adult health/sport clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotels/motels, adult body painting studios, and other premises, enterprises, establishments, businesses or places open to some or all members of the public, at or in which there is an emphasis on the presentation, display, depiction, or description of "specified sexually activities" or "specified anatomical areas" which are capable of being seen by members of the public.

Mankato City Code § 10.83 subd. 1A. The City contends that if Fatal Attraction is allowed to perform, Buster's will

qualify as an "'adult use cabaret" on the evening in question. Subdivision 1F defines an "adult use cabaret" as a:

> building or portion of a building used for providing dancing or other live entertainment, if such building or portion of a building excludes minors by virtue of age or if such dancing or live entertainment is distinguished or characterized by an emphasis on the presentation, display, depiction or description of "specified sexual activities" or "specified anatomical areas."

Mankato City Code § 10.83 subd. 1F. Subdivision 1A1, in turn, defines "specified anatomical areas" as:

> a. Less than completely and opaquely covered human genitals, pubic region, buttock, anus or female breast(s) below a point immediately above the top of the areola.
>
> b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Mankato City Code § 10.83 subd. 1A1. Furthermore, subdivision 1A1 identifies, in relevant part, the following as "specified sexual activities" forbidden by § 10.83.

> b. Clearly depicted human genitals in a state of sexual stimulation, arousal, or tumescence.
>
> d. Fondling or touching of nude human genitals, pubic region, buttocks, or female breasts.

Mankato City Code § 10.83 subd. 1A2. In December 1998, Buster's filed suit in this Court, seeking a declaration that the Adult Use-Principal provision of § 10.83 violate the First and Fourteenth Amendments, both on its face and as

applied to Buster's. With its answer, the City filed a counterclaim, seeking a declaration on the constitutionality of § 10.83 as well as an injunction enjoining Buster's from staging a performance by Fatal Attraction or other similar act. Shortly after the City answered, Buster's moved for a preliminary injunction, asking the Court to enjoin the City's enforcement of the zoning ordinance and allow a one-night performance by Fatal Attraction. On January 15, 1999, this Court denied Buster's request, concluding that Buster's was unlikely to prevail on the merits of its case against the City because § 10.83 was most likely a constitutional time, place, and manner restriction on expressive conduct, not an impermissible ban thereof.

In October 1999, the City amended the Code by adding section 4.09 thereto, which prohibits holders of on-sale liquor licenses from allowing any adult use (as defined by § 10.83) on the licensed premises. The ordinance clearly states that the purpose is to prevent "undesirable behavior that is not in the best interest of the City's public health, safety, and general welfare," to avoid "potential disturbances and potential adverse affects" associated with adult uses on premises licenses to serve alcohol, and recognizing that such uses have a potential for "increasing crime and lowering property values and increas[ing] the potential for neighborhood blight." Mankato City Code § 4.09. Pursuant to an agreement between the parties, Buster's amended its Complaint to challenge the constitutionality of the liquor licensing as well.

Both Buster's and the City have now moved for summary judgment.

STANDARD

As the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as

a whole." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Summary judgment is appropriate if there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 327; Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir. 1992). The Court determines materiality from the law governing the claim. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. See id. A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. See id.

DISCUSSION

A. The Zoning Ordinance.

Buster's challenges the zoning ordinance as unconstitutionally overbroad because it is not narrowly tailored to combat only demonstrated adverse secondary effects of adult uses. The City, in turn, contends that § 10.83 is a constitutional restriction on the permissible locations for adult uses under the framework established by the Supreme Court in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

The parties do not dispute that nude dancing is "expressive conduct" entitled to some modicum of protection under the First Amendment. See Barnes v. Glen Theaters, Inc., 501 U.S. 560, 566 (1991). It is, however, conduct "only marginally" within the outer ambit of the First Amendment. See id.; Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981). Because the City's zoning ordinance places restrictions on the locations where adult uses are permitted, rather than prohibiting adult uses throughout the City, the ordinance is

analyzed as a time, place, and manner regulation of expressive conduct. See Renton, 475 U.S. 41, 46 (1986); Holmberg v. City of Ramsey, 12 F.3d 140, 142 (8th Cir. 1993) (using Renton analysis to weigh constitutionality of zoning restriction on adult uses). Under Renton, a zoning ordinance like the one at issue here is valid if it is content-neutral, it serves a substantial governmental interest, and it does not unreasonably limit alternative avenues of communication. See Renton, 475 U.S. at 47. An analysis using the Renton factors compels the conclusion that the zoning ordinance is constitutional.

First, § 10.83 is content-neutral. There is a presumption that a time, place, and manner restriction is content-neutral because it constrains where, when or how a message can be conveyed, but does not ban the message or limit the number of speakers who can express the message. See Young v. American Mini Theaters, Inc., 427 U.S. 50, 82 n.4 (1976) (Powell, J., concurring). Even ordinances specifically regulating adult entertainment are considered content-neutral, as long as they are "justified without reference to the content of the regulated speech." Renton, 475 U.S. at 47-48. By stating its desire to prevent the deleterious secondary effects which have often been shown to stem from adult uses, the City has demonstrated a legitimate government interest unrelated to the suppression of expression. In its briefs, Buster's cites language from members of the Mankato Common Council which suggest, however, that enmity toward nude dancing and other adult uses may have been the true motivating force behind the passage of Mankato's ordinances against adult uses, at least for some members. (See Tigue Aff. Ex. B-proceedings of Mankato City Council 10/11/99 at 6.)[1] The

[1] In reference to the liquor ordinance, for example, Councilperson Anne Ganey stated "most of the adult uses in the city are in my ward and I hear about them. Residents in my ward, and what I hear is they wish we could do away with the ones that are there now and they certainly don't want more than the reason I'll be supporting this ordinance." [sic].

Eighth Circuit, however, has declined to inquire into the actual motivations of legislators once satisfied that there exists "a current governmental interest in the service of which the . . . statute may be constitutional." Farkas v. Miller, 151 F.3d 900, 905 (8th Cir. 1998), citing Barnes, 501 U.S. at 582 (Souter, J., concurring). The desire to rid Mankato of the secondary effects which may arise from adult uses constitutes such a current governmental interest.

The fact that the City's ordinance is designed to serve an important or substantial government interest satisfies the second element of the Renton test. This element actually requires two separate demonstrations: first, that there is a substantial government interest; and second, that the regulation is designed to further the end of combating that harm (i.e., the ordinance is reasonably calculated to be effective). "[I]t is not enough for the City to merely to give lip service to a legitimate governmental interest. The City also has the burden to substantiate its declaration that zoning regulations are needed to curb unwanted secondary effects." Holmberg, 12 F.3d at 143. The City's position is clear. In deciding what form regulation of adult uses should take, the City reviewed studies undertaken and ordinances passed by St. Paul, Indianapolis, and Rochester, Minnesota. (See Def.'s Mem. in Supp. at 3.) Renton itself counsels that reliance on studies conducted by other cities is sufficient if those studies are "reasonably believed to be relevant." City of Renton, 475 U.S. at 51; see also ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1415 (8th Cir. 1990) (city reasonably relied on studies of other cities motivated by "similar concerns"). Furthermore, there is no requirement that the remedy chosen, such as restricting adult uses to specific

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Councilperson Jack Considine further opined "yeah, we don't want to have it here . . . it's not something we find desirable for the community." See id.

locations, be concretely proven to eliminate secondary effects. Localities are usually allowed significant leeway in choosing how to address a problem, or which aspect of it to focus on first. "It is not our function to appraise the wisdom of [the City's] decision. . . [T]he City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Young, 427 U.S. at 71.

Buster's argues that the ordinance fails this prong of the Renton test because it is not "narrowly tailored" to combat only those adult uses shown to have produced deleterious secondary effects. (See Pl.'s Mem. in Supp. at 13-14.) According to Buster's, Renton requires that the ordinance be written so as to apply only to those adult uses that have actually been proven to cause adverse secondary effects. See Renton, 475 U.S. at 52. ("the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce unwanted secondary effects, thus avoiding the flaw that proved fatal in [Schad] and Erzoznik v. City of Jacksonville" [citations omitted]). Despite the apparent strength of this language, courts have hesitated before imposing a "least restrictive means" requirement on ordinances regulating adult uses, as is the case with restrictions on fully protected speech, such as political speech. See Brd. of Trustees of State University of New York v. Fox, 492 U.S. 469, 478 (1989). Renton and other case do not require, as Buster's suggests, that the ordinance attack only those uses demonstrated to have caused secondary effects. Instead, restrictions on expressive conduct must not "burden substantially more speech than is necessary to further the government's legitimate interests." Id. Courts have not required that an ordinance affect only those establishments "shown to produce" secondary effects, as long as the subjects of regulation are "reasonably believed" to produce the unwanted harm.

In addition, Buster's argues that the ordinance is unconstitutional as applied to a one-night adult use, in the absence of any evidence that a one-night adult use would cause any adverse secondary effects. In support of this position, Buster's cites People v. Superior Court (Lucero), 774 P.2d 769 (1989) and Tollis, Inc. v. San Bernadino County, 827 F.2d 1329, 1333 (9th Cir. 1989), both of which required the defendant to prove that harmful secondary effects would stem from a one-time adult use. Lucero determined that an adult use must be a business' "regular and substantial course of conduct" before it can be regulated as an adult use. In Tollis, the Ninth Circuit read Renton as requiring the government to show "it relied upon evidence permitting [a] reasonable inference" that secondary harm would occur unless an adult use were regulated; the court determined that the standard was not met when the county had "presented no evidence that a single showing of an adult movie would have harmful secondary effects on the community." Tollis, 827 F.2d at 1333.

Neither Lucero nor Tollis, however, provide the rule of decision in this case. In Tollis, the statute at issue did not define, in any manner, how extensive an "adult use" had to be in order to fall within the zoning ordinance's ambit. The plaintiff asked for an injunction against the ordinance, claiming that it was unconstitutionally vague because it failed to state how frequently adult films would have to be shown in order to make a movie theater an "adult oriented business." The Tollis court concluded that the county had done nothing to show that one-time uses would produce any unwanted secondary effects, or that the ordinance had contemplated such infrequent activity. See id. at 1333. Furthermore, the court stated "[n]or do we see how the County could make such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects." Id. By contrast, § 10.83 is

more definite in its scope of application. The ordinance specifically provides that penalties for violating § 10.83 are assessed on a daily basis, see Mankato City Code § 10.83, thus compelling the inference that the City Council, after having reviewed the studies conducted by other cities, concluded that a one-day adult uses could cause undesirable secondary effects. The "vagueness" problem presented by the ordinance at issue in Tollis is thus absent here. Additionally, this Court is in no way bound by the Ninth Circuit's unneeded determination that it would be impossible for the government to demonstrate that a one-day adult use could cause undesirable secondary effects. The Tollis court had no evidence before it on this point, and should not have crafted this strong presumption against such a demonstration.[2]

Lucero examined a type of "non-cluster" or "anti-skid row" ordinance aimed at limiting both an adult use's effects on the surrounding neighborhood as well as the establishment of a "red-light district" to which a number of adult uses

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[2] To the contrary, it is quite easy to imagine numerous situations where a one-time adult use–or even a non-adult use–would have very compelling adverse secondary effects. For example, a well-publicized, one-time performance by a troop of adult dancers in a residential neighborhood could lead to a host of problems the City has every right to legislate against–disruption of traffic patterns, litter, public drunkenness, and crime, all in the vicinity of homes and children. Although these temporary effects would certainly be less burdensome than those stemming from a continuous use on the same property, the City would certainly have a strong interest in banning even these temporary secondary effects. The relevant considerations in determining whether or not a one-time adult use would be serious enough to legislate against would seem to be (1) the nature of the use; (2) the extent to which the use departs from the customary use of the surrounding area; (3) the degree of publicity the use has received, such that the use will attract an unusually large number of people to the area on the day in question; and (4) the degree to which such a use has been linked to problems elsewhere, taking into account durational differences between the uses.

congregated.[3] The Lucero court concluded "[b]ecause adult entertainment ordinances are aimed at regulating the clustered establishment of adult entertainment businesses and not at prohibiting theater owners from occasionally exhibiting an 'adult' film, we conclude a 'regular and substantial course of conduct' standard most appropriately defines the constitutional level of 'use' for such ordinances." Lucero, 774 P.2d at 776-777. This Court respectfully declines to adopt the standard set forth in Lucero. The rule established by Lucero is the epitome of extra constitutional judicial lawmaking. As Justice Mosk stated in that very case:

> The result is judicial legislating. Creation of the "regular and substantial course of conduct" standard is unjustified because we have been presented with no evidence that the new untested standard would ameliorate the secondary effects of adult-oriented businesses while accommodating individuals' access to communications protected by the free speech provisions of the federal and state Constitutions [. . .] If the "regular and substantial course of conduct" standard were adopted by a legislative body in the same unstudied manner as it is suggested by the majority, courts would be required to strike it down because it fails to meet the Young criteria.

Id. at 779-780 (Mosk, J., concurring in the judgment). Nothing in the language, doctrine, or history of the First Amendment supports the proposition that a locality may limit adult uses only when they occur "regularly." Regulation may

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[3] To do so, the Long Beach zoning ordinance forbade adult uses from locating within 500 feet of any residential zone, within 1000 feet of a school, park, playground or church, of within 1000 feet of any other adult use. See Long Beach Municipal Code Chapter 21.51 (1979).

occur when harm may occur. Furthermore, Lucero is not necessarily grounded in the First Amendment of the federal constitution; instead, some courts have opined that the "regular and substantial" test in Lucero was based on the requirements of the California constitution. See DiRaimo v. City of Providence, 714 A.2d 554, 557 n.5 (R.I. 1998). No court has explicitly adopted such a test as part and parcel of First Amendment jurisprudence, and this Court will not expand the bounds of the First Amendment to craft such a standard here.

Finally, the ordinance meets the third element of the Renton test because it does not unreasonably limit alternative avenues of communication. As long as the City's zoning scheme allows for adult uses somewhere within the jurisdiction, adequate alternative channels of communication are open. See City of Renton, 475 U.S. at 53; Holmberg, 12 F.3d at 144 ("[b]ecause the ordinance provides Holmberg with potential relocation sites in accessible commercially zoned areas, we conclude the ordinance does not unreasonably limit alternative avenues of communication"). Section 10.83 allows adult uses within the B-2 commercial district and the M-1 light industrial district, as long as such use is not within 350 feet of another adult use or a school, library, park, or church. See Mankato City Code § 10.83. Buster's does not contend that the locations left open for adult uses are inadequate. The Court will thus consider the third part of the Renton test–and, as a result, the standard set by the Supreme Court–satisfied.

B. The Liquor Ordinance. Prior to 1996, the Supreme Court had determined that local ordinances concerning alcohol were presumptively constitutional, even if they infringed on First Amendment rights, based on the "largely unfettered" power to regulate alcohol delegated to the States by the Twenty-First Amendment. See California v. LaRue, 409 U.S. 109 (1972); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (Twenty-First Amendment gives states broad powers to

regulate sale and use of alcohol). However, in 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996), the Supreme Court abandoned the reasoning used (but not the result reached) in LaRue and stated "we now hold that the Twenty-First Amendment does not qualify the constitutional prohibition on laws abridging the freedom of speech embodied in the First Amendment." 44 Liquormart, 517 U.S. at 516. Although the amendment allows the States to enact legislation that would otherwise violate the Dormant Commerce Clause, it "does not license [them] to ignore their other obligations under other provisions of the Constitution." Id., quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984). In other words, "the Twenty-First Amendment cannot save an otherwise invalid restriction on speech." Id. at 532 (O'Connor, J., concurring).

As noted, however, the Court did not abandon the result reached in LaRue. That statement is important, for the ordinance at issue in LaRue and Mankato's liquor ordinance are extremely similar. LaRue examined California regulations that prohibited the following activities on premises licensed to serve alcohol. Among the restrictions the Court upheld included prohibitions against:

> (a) The performance of acts, or simulated acts, of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;
>
> (b) The actual or simulated "touching, caressing or fondling on the breast, buttocks, anus or genitals";
>
> (c) the actual or simulated "displaying of the pubic hair, anus, vulva or genitals";
>
> (d) the permitting by a licensee of "any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus"; and

(e) the displaying of films or pictures depicting acts a live performance of which was prohibited by these [regulations].

LaRue, 409 U.S. at 111-112 (citation omitted). As noted above, the Court upheld these regulations on the basis of the Twenty-First Amendment. However, in 44 Liquormart, the Court overturned this rationale and substituted a new ground for decision in LaRue:

> Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the LaRue opinion regardless of whether alcoholic beverages are involved.

44 Liquormart, 517 U. S. at 517. Based on this language, it would appear that the City has an iron-clad justification for the alcohol ordinance-the power of the State to provide for the health, safety, and welfare of its citizens. Buster's, however, argues that LaRue and 44 Liquormart provide no justification at all for the liquor ordinance, because the police power justification stated in 44 Liquormart was effective only because the California regulations at issue in LaRue were designed to target "bacchanalian revelries" which had proved troublesome to the community. Because "the breadth of the [Mankato] ordinance at issue here goes far beyond that necessary to restrict 'bacchanalian revelries,'" Buster's contends the police power cannot provide a basis for the City's actions here. (See Pl.'s Mem. in Supp. at 19.)

Merely asserting a difference between the two regimes, however; does not make it true. A careful analysis of the prohibitions on adult uses imposed by the California regulations in LaRue and by the City of Mankato clearly demonstrates that the Mankato restrictions are of no greater scope than those at issue in LaRue. Both, for example, forbid the fondling of breasts, genitals, and buttocks; both prohibit the depiction of an enumerated list of forbidden sexual acts; both disallow the presentation of specified uncovered body parts; and both prevent the showing of films depicting these acts. See Mankato City Code § 10.83 subd. 1A1 and 1A2. In short, there are no material differences between California's regulatory system and Mankato's liquor ordinance. Just as California was justified in imposing its regulations on alcohol and adult uses, so, too, is the City here. Because of this strong justification, there is no need to consider whether the ordinance passes muster under United States v. O'Brien, 391 U.S. 367, 377 (1968).

Buster's attempts to overcome the precedential force of LaRue by relying directly on Lounge Mmgt. Ltd. v. Town of Trenton, 580 N.W.2d 156 (Wis. 1998), in which the Wisconsin Supreme Court purportedly struck a provision forbidding liquor establishments from featuring adult entertainment "precisely because it was not narrowly drawn to restrict only those uses found to have caused adverse secondary effects." (Pl.'s Mem. in Supp. at 20.) A careful reading of the restriction; however, demonstrates that Lounge Management has absolutely no precedential value in these circumstances at all. The chief infirmity with the ordinance at issue in Lounge Management was that it forbade public nudity not only at licensed liquor establishments, but at all "publicly licensed establishments." As a result, the ordinance had the effect of banning activity completely within the scope of First Amendment protection, such as exhibiting a painting containing a nude human form in an art gallery, or nudity

occurring in a private hotel room. See id. at 161. As Justice Steinmetz pointed out in a dissenting opinion, the ordinance could have been saved by giving it a narrow reading, confining the ordinance's reach only to those establishments licensed to serve alcohol. See id. at 166 (Steinmetz, J., dissenting). Had that been the case, LaRue could possibly have provided a ground on which to justify the statute.

CONCLUSION

Mankato's Adult Use ordinance, a content-neutral time, place and manner restriction, satisfies the Renton test because it is designed to serve a substantial governmental interest and does not unreasonably limit alternative channels of communication. Similarly, the ordinance banning adult uses from establishments licensed to serve alcohol falls within the legitimate scope of the City's police power to prevent harm to the community's health, welfare, and morals.

The First Amendment simply cannot trump the legitimate power, and duty, of local governments to regulate uses that can adversely affect the community. The position advanced by Buster's is untenable. The law does not provide for "infrequent" transgressions. The sale of methamphetamine, for example, is illegal–there is no exception for one-time sales or "infrequent" distribution of the drug. More similarly, communities are allowed–provided certain constitutional standards are met–to require parade permits of groups wishing to congregate in a public area and voice their opinions. See Cox v. New Hampshire, 312 U.S. 569, 574-76 (1941). It is no defense that a group intends to parade only once, or annually. In all these cases, the government has determined a harm flows from a certain activity, and has regulated accordingly. One disagreeing with the City's actions may not simply opt out of the restrictions by relying on their temporary nature. Accordingly, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Summary Judgment (Clerk Doc. No. 23) is **DENIED**;

2. Defendant's Motion for Summary Judgment (Clerk Doc. No. 29) is **GRANTED**;

3. Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**;

3. Mankato City Code § 10.83 is a constitutional time, manner, and place restriction on expressive conduct to the extent that it forbids infrequent adult uses in areas where such uses are generally forbidden; and

4. Mankato City Code § 4.09 is a constitutional exercise of the City's police power.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 14, 2000

/s/
Paul A. Magnuson
United State District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BZAPS, Inc., d/b/a Buster's Bar, Civ. File No. 98-2588 (PAM/JGL)

Plaintiff,

v. **MEMORANDUM AND ORDER**

City of Mankato, a municipal corporation,

Defendant.

This matter is before the Court upon Plaintiff's Motion for a Preliminary Injunction. For the following reasons, Plaintiff's motion is denied.

BACKGROUND

Plaintiff BZAPS, Inc. ("Buster's) owns and operates Buster's Bar in Defendant City of Mankato, Minnesota ("Mankato" or "the City"). Buster's is located in a B-1 zoning district, a Community Business District. Because Buster's is classified as a "drinking establishment" under the zoning regulations, it operates as a conditional use in the B-1 district.

The present controversy involves Buster's plan to host a male dance review, called "Fatal Attraction," which includes male dancers performing in various stages of nudity. Buster's first inquired about the possibility of hosting such a show in November 1998. At that time, Paul Vogel, Mankato's zoning administrator, informed Buster's that, assuming the performances fell within the definition of an "adult use," they

would not be allowed. Adult uses are prohibited in the B-1 zoning district. Currently, Buster's has scheduled "Fatal Attraction" to perform on January 28, 1999.

The Mankato City Code restricts "adult use-principal" to the B-2 General Commercial Business District and the M-1 Light Industrial District, provided that other conditions are met. (See Def.'s Ex. 1.) The zoning code defines the term "adult use-principal" as "[a] use, business, or establishment having more than 10% of its stock in trade or floor area allocated to, or more than twenty percent (20%) of its gross receipts derived from, any adult use." (Id.) "Adult use" is then defined as follows:

> Adult uses include adult bookstores, adult motion picture theaters, adult motion picture rental, adult mini-motion picture theaters, adult massage parlors, adult steam room/bathhouse/sauna facilities, adult companionship establishments, adult rap/ conversation parlors, adult health/sport clubs, adult cabarets, adult novelty businesses, adult motion picture enterprises, establishments, businesses or places open to some or all members of the public, at or in which there is an emphasis on the presentation display, depiction or description of "specified sexual activities" or "specified anatomical areas."

(Def.'s Ex. 1.) Before this zoning code was adopted by the City Council in 1996, the council and Planning Commission reviewed studies conducted in several other cities. These studies focused on the adverse secondary effects of certain adult uses. It is not disputed that the scheduled "Fatal Attraction" performance will include partial nudity and is, thus, an adult use. The parties' dispute centers on whether a

single performance by such a group renders Buster's an "adult use-principal."

The City's position is that if Buster's allows "Fatal Attraction" to perform for a single night, and on that night the performance generates more than twenty percent of Buster's revenue or occupies more than ten percent of the floor space at Buster's, Buster's will be considered an adult use-principal. As such, it will not be allowed to operate in its existing B-1 zoning district. The City supports this interpretation of the Code by pointing out that the zoning code considers each day a separate violation. If Buster's does violate the zoning code, it faces criminal penalties including a fine and imprisonment. Accordingly, Buster's now moves for a preliminary injunction to restrain enforcement of the zoning code and allow the one-day performance by "Fatal Attraction."

DISCUSSION

The Eighth Circuit has established the following analysis to be used in considering a preliminary injunction motion:

> [W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Sys., Inc. v. C. L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981); accord Medtronic, Inc. v. Gibbons, 527 F. Supp.1085,1090 (D. Minn. 1981). An analysis of these factors leads the Court to conclude that Plaintiff's motion should be denied.

Buster's asserts that it will be irreparably harmed because it will be forced to face prosecution if it allows the "Fatal Attraction" performance. Buster's motion is based upon the theory that it has a First Amendment right to allow the "Fatal Attraction" group to perform. It is true that in Elrod v. Burns, 427 U.S. 347, 373 (1976), the Supreme Court held that in a case involving loss of employment, curtailing First Amendment rights constitutes irreparable injury. However, in Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975), the Supreme Court stated that a preliminary injunction should only issue after application of a stringent standard which "weigh[s] carefully the interests on berth sides." This Court agrees with the First Circuit that a threatened criminal prosecution in and of itself does not constitute irreparable injury. See Rushia v. Town of Ashburnham, 701 F.2d 7, 9 (1st Cir. 1983). Thus, this Court is not entirely convinced that Buster's has established irreparable injury. However, even if such injury is established, the Court finds that Buster's has not shown that it is likely that it will prevail on the merits of its constitutional claim.

Buster's contends that the Supreme Court has held nude dancing to be an activity entitled to First Amendment protection. See California v. LaRue, 409 U.S. 109, 118 (1972). While Buster's acknowledges that the City may regulate adult activity, Buster's claims that the City's zoning ordinance, as it relates to adult uses, is unconstitutionally overbroad. The Supreme Court has addressed the issue of overbreadth in several cases.

In Young v. American Mini Theaters, Inc., 427 U.S. 50, 62-63 (1976), the Court upheld an ordinance which prohibited adult theaters from being located within 1000 feet of any two other regulated uses. The Court noted that the ordinance was enacted because Planners felt that the location of several adult businesses in one neighborhood would have an adverse effect

on property values and encourage crime. Id. at 55. Thus, despite the fact that the ordinance was content-based, it was constitutional because the basis for enacting the ordinance was to curb the secondary effects of such activity. Similarly, in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54-55 (1986), and the Supreme Court upheld an adult entertainment zoning ordinance because the ordinance was aimed at curbing the secondary effects caused by the speech.

It is important to note that while the Supreme Court has held that nude dancing is expressive conduct to be protected by the First Amendment, the Court has also stated that nude dancing is "only marginally" within the outer perimeters of the First Amendment. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991). The Barnes Court held that the applicable analysis for nude dancing "speech" is the four-part test set forth in United States v. O'Brien, 391 U.S. 367 (1968). See id. at 566-67. There, the Supreme Court held that a "time, place, or manner" restriction is constitutional if

> it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. In analyzing a similar time, place, and manner restriction in City of Renton, the Court stated that the relevant question is "whether the ... ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." City of Renton, 475 U.S. at 50.

In the present case, because the City's ordinance merely limits the places where adult uses may be located, it is properly analyzed as a "time, place, and manner" restriction. See City of Renton, 475 U.S. at 46. The City's stated purpose in adopting the adult use ordinance was to "regulate the potential adverse secondary characteristics of adult uses and to insure that those adverse secondary effects do not contribute or enhance criminal activity or contribute to the blighting or downgrading of surrounding property." (Def.'s Mem. Opp'n at 3.).

This Court finds that Buster's has not shown that it is likely to prevail on the merits of the present dispute because, at this early stage of the proceedings, it appears that the City's ordinance meets the test set forth in O'Brien and City of Renton. As in City of Renton, the City has relied upon studies conducted by other cities to determine the potential secondary effects of adult uses, including nude dancing. Preventing these adverse secondary effects constitutes a substantial governmental interest. See City of Renton, 475 U.S, at 50-51. Plaintiffs make much of the fact that those studies have not been provided to the Court. However, at this juncture, it would not be proper for this Court to summarily dismiss these studies or to speculate as to their reliability. Additionally, the City's zoning code allows for other avenues of adult speech, as long as the time, place, and manner restrictions are satisfied. Thus, at this juncture, it appears that the City's adult use ordinance is a constitutional time, place, and manner restriction.

Buster's also argues that the zoning ordinance is unconstitutionally overbroad in its definitions of specified types of adult uses. Essentially, Buster's contends that the broad definitions of adult uses mean that many uses will be restricted, even though such restrictions will not serve the stated governmental interest of preventing adverse secondary

effects. According to Buster's, unless the City can show that a one day showing of "Fatal Attraction" will cause the stated adverse secondary effects, its ordinance is unconstitutional. As an example, Buster's points to the City's definition of "adult use-accessory," which applies to a "use, business, or establishment having ten percent (10%) or less of its stock in trade or floor area allocated to, or twenty percent (20%) or less of its gross receipts derived from movie rentals or magazine sales." (Def.'s Ex. A.) Buster's notes that it currently fits that definition, as do many business who have zero percent of their businesses represent movie rentals or magazine sales.

This Court is not persuaded that Buster's will prevail on the merits of such a claim. Importantly, Section 10.83 of the City's Zoning Ordinance is titled "Adult Uses." It would be illogical to apply the definitions under that category to businesses which have nothing to do with adult uses. Obviously; the ordinances falling under this section are to be applied only to businesses already engaging in adult uses. Additionally, although Buster's cites several cases to support its position, these cases addressed speech restrictions which were content-based. See Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). The City's restriction on the time, place, and manner of adult uses is not content-based.

Additionally, at this juncture, the Court disagrees with Buster's claim that the City cannot deem Buster's an adult use based on one day's activities. As the City points out, Buster's only wants to show this performance for one day; thus, the City can only assess the activity undertaken on that specific day. It would be nonsensical if the City could not enforce its ordinances when people choose to disregard them for only one day. Moreover, the Court finds the City's interpretation of the

zoning ordinance to be reasonable considering the fact that violations are also assessed on a daily basis. Accordingly, this Court finds that Buster's is unlikely to succeed on the merits of its First Amendment claim.

Finally, the Court notes that the public interest is served by allowing cities to implement zoning plans. Minnesota law enables municipalities to regulate land uses within the City. See Minn. Stat. § 432.351 et. seq. Additionally, the Supreme Court recognized the need for cities to be able to implement reasonable zoning solutions to potential problems. See Young, 427 U.S. at 71. To date, Buster's has not hosted any nude dancing entertainment. This Court believes that until the present dispute is resolved, it is best to maintain this status quo. Therefore, Plaintiff's Motion for a Preliminary Injunction is denied.

CONCLUSION

Buster's has not shown that it is likely to prevail on the merits of its First Amendment Claim. In addition, the Court is not persuaded that irreparable injury will occur if the injunction is not granted. Lastly, the public interest is best served when municipalities are allowed to enact regulatory ordinances. The balance of the Dataphase factors weighs in favor of the City. Therefore, Plaintiff's motion for a preliminary injunction must be denied.

Accordingly, **IT IS HEREBY ORDERED** THAT:

Plaintiff's Motion for a Preliminary Injunction (Clerk Doc. No. 2) is DENIED.

Dated: January 15, 2000

/s/

Paul A. Magnuson
United State District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3214

BZAPS, Inc., Doing Business as Buster's Bar,	*	
Appellant,	*	Order Denying Petition for Rehearing and for
vs.	*	Rehearing En Banc
City of Mankato,	*	
Appellee.	*	

The petition for rehearing en banc is denied. Judge McMillian and Judge Bye would grant the petition. The petition for rehearing by the panel is also denied.

(5128-010199)

December 5, 2001

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Sec. 10.83 Adult Uses.

Subd. 1. Definitions

A. **Adult Uses.** Adult uses include adult bookstores, adult motion picture theaters, adult motion picture rental, adult mini-motion picture theaters, adult massage parlors, adult steam room/bathhouse/sauna facilities, adult companionship establishments, adult rap/conversation parlors, adult health/sport clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotels/motels, adult body painting studios, and other premises, enterprises, establishments, businesses or places open to some or all members of the public, at or in which there is an emphasis on the presentation, display, depiction or description of "specified sexual activities" or "specified anatomical areas" which are capable of being seen by members of the public.

1. **Specified Anatomical Areas:**

a. Less than completely and opaquely covered human genitals, pubic region, buttock, anus, or female breast(s) below a point immediately above the top of the areola.

b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

2. **Specified Sexual Activities:**

a. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral-anal copulation, beastiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual

relationship, or the use of excretory functions in the context of a sexually relationship, and any of the following sexual-oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

b. Clearly depicted human genitals in the state of sexual stimulation, arousal or tumescence.

c. Use of human or animal ejaculation, sodomy, oral copulation, coitus, or masturbation.

d. Fondling or touching of nude human genitals, pubic region, buttocks, or female breast.

e. Situations involving a person or persons, any of whom are nude, clad in undergarments or in sexually revealing costumes, and who are engaged in activities involving the flagellation, torture, fettering, binding or other physical restraint of any such persons.

f. Erotic or lewd touching, fondling or other sexually-oriented contact with an animal by a human being.

g. Human erection, urination, menstruation, vaginal or anal irrigation.

B. **Adult Uses-Accessory.** A use, business, or establishment having ten percent (10%) or less of its stock in trade or floor area allocated to, or twenty percent (20%) or less of its gross receipts derived from movie rentals or magazine sales.

C. **Adult Uses-Principal.** A use, business, or establishment having more than 10% of its stock in trade or floor area allocated to, or more than twenty percent (20%) of its gross receipts derived from, any adult use.

D. **Adult Use-Body Painting Studio.** An establishment or business which provides the service of applying paint or other substance, whether transparent or non-transparent, to or on the body of a patron when such body is

wholly or partially nude in terms of "specified anatomical areas."

E. **Adult Use-Bookstore.** A building or portion of a building used for the barter, rental or sale of items consisting of printed matter, pictures, slides, records, audio tape, videotape, or motion picture film if such building or portion of a building is not open to the public generally but only to one or more classes of the public extending any minor by reason of age or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas "

F. **Adult Use-Cabaret.** A building or portion of a building used for providing dancing or other live entertainment, if such building or portion of a building excludes minors by virtue of age or if such dancing or other live entertainment is distinguished or characterized by an emphasis on the presentation, display, depiction or description of "specified sexual activities" or "specified anatomical areas."

G. **Adult Use-Companionship Establishment.** A companionship establishment which excludes minors by reason of age, or which provides the service of engaging in or listening to conversation, talk or discussion between an employee of the establishment and a customer, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

H. **Adult Use-Conversation/Rap Parlor.** A conversation/rap parlor which excludes minors by reason of age, or which provides the service of engaging in or listening to conversation, talk, or discussion, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

I. **Adult Use-Health/Sport Club.** A health/sport club which excludes minors by reason of age, or if

such club is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

J. **Adult Use-Hotel or Motel.** Adult hotel or motel means a hotel or motel from which minors are specifically excluded from patronage and wherein material is presented which is distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."

K. **Adult Use-Massage Parlor, Health Club.** A massage parlor or health club which restricts minors by reason of age, and which provides the services of massage, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

L. **Adult Use-Mini-Motion Picture Theater.** A building or portion of a building with a capacity for less than fifty (50) persons used for presenting material if such building or portion of a building as a prevailing practice excludes minors by virtue of age, or if such material is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

M. **Adult Use-Modeling Studio.** An establishment whose major business is the provision, to customers, of figure models who are so provided with the intent of providing sexual stimulation or sexual gratification to such customers and who engage in "specified sexual activities" or display "specified anatomical areas" while being observed, painted, painted upon, sketched, drawn, sculptured, photographed, or otherwise depicted by such customers.

N. **Adult Use-Motion Picture Arcade.** Any place to which the public is permitted or invited wherein coin or slug-operated or electronically, electrically or mechanically controlled or operated still or motor picture machines, projectors or other image-producing devices are maintained to

show images to five (5) or fewer persons per machine at any on time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing "specified sexual activities" or "specified anatomical areas."

O. **Adult Use-Motion Picture Theater.** A building or portion of a building with a capacity of fifty (50) or more persons used for presenting material is such building or portion of a building as a prevailing practice excludes minors by virtue of age or if such material is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

P. **Adult Use-Novelty Business.** A business which has as a principal activity the sale of devices which stimulate human genitals or devices which are designated for sexual stimulation.

Q. **Adult Use-Sauna.** A sauna which excludes minors by reason of age, or which provides a steam bath or heat bathing room used for the purpose of bathing, relaxation, or reducing, utilizing steam or hot air as a cleaning, relaxing or reducing agent, if the service provided by the steam room/bathhouse facility is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

R. **Adult Use-Steam Room/Bathhouse Facility.** A building or portion of a building used for providing a steam bath or heat bathing room used for the purpose of pleasure, bathing, relaxation, or reducing, utilizing steam or hot air as a cleaning, relaxing or reducing agent if such building or portion of a building restricts minors by reason of age or if the service provided by the steam room/bathhouse facility is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas."

Subd. 2. Purpose. The nature of adult uses is such that they are recognized as having adverse secondary characteristics, particularly when they are accessible to minors and located near residential property or related residential uses such as schools, day care centers, libraries or parks. Furthermore, the concentration of adult uses has an adverse effect upon the use and enjoyment of adjacent areas. The nature of adult uses requires that they not be allowed within certain zoning districts, or within minimum distances from each other or residential uses. Special regulation of adult uses is necessary to ensure that the adverse secondary effects would not contribute or enhance criminal activity in the area of such uses nor will it contribute to the blighting or downgrading of the surrounding property and lessening of its value.

Subd. 3. General Provisions. Adult uses as defined in this Chapter shall be subject to the following general provisions:

A. Activities classified as obscene are not permitted and are prohibited. In no instance shall the application or interpretation of this ordinance be construed to allow an activity otherwise prohibited by law.

B. Adult uses, either principal or accessory, shall be prohibited from locating in any building which is also utilized for residential purposes.

C. An adult use which does not qualify as an accessory use pursuant to Section 10.83, Subd. 5, shall be classified as an adult use-principal.

Subd. 4. Adult Use, Principal.

A. Adult use-principal shall be a permitted use in the B-2, General Commercial Business District, and the M-1, Light Industrial District, subject to the locational criteria outlined in Subd. 3(B).

B. Adult use-principal shall be located at least three hundred fifty (350) radial feet, as measured in a straight line from the closest point of the property line of the building upon which the adult use-principal is located to the property line of:

1. A zoning district in which residential uses are specifically listed as a permitted or conditional use.
2. A licensed day care center.
3. A public or private educational facility classified as an elementary, junior high or senior high.
4. A public library.
5. A public park.
6. Another adult use-principal.
7. Any church or church related organization.

C. No adult use-principal shall be located in the same building or upon the same property as another adult use-principal. This limitation does not apply to any business or establishment that contains more than one adult use-principal as of August 26, 1996.

D. Adult use-principal shall adhere to the following signing regulations in addition to the sign regulations of Section 10.87.

1. Sign messages shall be generic in nature and shall only identify the name of business.
2. Signs shall comply with the requirements of size and number for the district in which they are located.

E. Adult use-principal shall be limited to 7:00 a.m. to 12:30 p.m. for its hours of operation. A differing time schedule may be approved by the City Council, if it can be satisfactorily demonstrated by the operator to the City Council that the all the following apply:

1. Not adversely impact or affect uses or activities within three hundred fifty (350) feet.

2. Will not result in increased policing and related service calls.

3. Is critical to the operation of the business.

Subd. 5. Adult Uses, Accessory. Adult Uses, Accessory, shall be permitted in all commercial districts, provided the accessory use conforms with the provisions of this Subd.

A. Adult use-accessory shall:

1. Comprise no more than ten percent (10%) of the floor area of the establishment in which it is located.

2. Comprise no more than twenty percent (20% of the gross receipts of the entire business operation.

3. Not involve or include any activity except the sale or rental of merchandise.

B. Adult use-accessory shall be restricted from and prohibit access to minors by the physical separation of such items from areas of general public access;

1. **Movie Rentals.** Display areas shall be restricted from general view and shall be located within a separate room, the access of which is in clear view and under the control of the persons responsible for the operation.

2. **Magazines.** Publications classified or qualifying as adult uses shall not be physically accessible to minors and shall be covered with a wrapper or other means to prevent display of any material other than the publication title.

3. **Other Use.** Adult uses-accessory not specifically cited shall comply with the intent of this Section subject to the approval of the Zoning Administrator.

C. Adult use-accessory shall be prohibited from both internal and external advertising and signing of adult materials and products.

Subd. 6. Nonconforming Adult Use-Principal or Accessory. Adult uses which are in existence prior to August 26, 1996, shall be classified as legal nonconforming uses and may continue in accordance with the provisions of this Chapter. If an adult use becomes nonconforming because of rezoning or the establishment of a use listed in Subd. 3, the adult use shall be considered legal nonconforming and may continue in accordance with the provisions of this Chapter. In no instance, shall a legal nonconforming adult use be allowed to structurally expand the use on the lot on which it is located when the use became legally nonconforming, or expand the adult use to include another lot on which the adult use was not located when it became legally nonconforming.

If the building in which a legal nonconforming adult use is located is destroyed by any means to an extend of greater than fifty percent (50%) of its market value, or if the building in which the legally nonconforming adult use is vacant for more than twelve (12) months, an adult use shall not be re-established unless it is in conformance with this Section.

Subd. 7. Enforcement.

A. Any person violating any provision of this Section is guilty of a misdemeanor and upon conviction shall be punished not more than the maximum penalty for a misdemeanor as prescribed by State Law.

B. Any violation of this Section shall be a basis for the suspension or revocation of the certificate of occupancy for the property or building in or on which the

adult use is located. In the event the City Council proposes to revoke or suspend a certificate of occupancy, the property owner shall be notified in writing of the basis for such proposed suspension or revocation. The City Council shall hold a hearing for the purpose of determining whether to revoke or suspend the certificate of occupancy, which hearing shall be within thirty (30) days of the date of the notice.

C. The City Council shall determine whether to revoke or suspend a certificate of occupancy within thirty (30) days after the close of the hearing or within sixty (60) days of the dates of the notice, whichever is sooner, and shall notify the property owner of its decision within that period.

Sec. 10.84. Non-Conformities.

Subd. 1. Purposes. This Section regulates and limits the continued existence of uses, structures, and lots established prior to the effective date of this Chapter that do not conform to the regulations of this Chapter applicable in the zoning districts in which such uses, structures, and lots are located.

The zoning districts established by this Chapter are designed to guide the future use of land within the City by encouraging the development or maintenance of desirable residential, business, office, institutional, and industrial areas with appropriate groupings of compatible and related uses and thus to promote and protect the public health, safety, and general welfare. The continued existence of non-conformities is frequently inconsistent with the purposes for which such districts are established and thus the gradual elimination of such non-conformities is generally desirable.

Subd. 2. General Scope and Scheme of Regulation. This Section establishes separate restrictions for the following categories of non-conformity:

A. Nonconforming uses (Subd. 3).
B. Nonconforming structures (Subd. 4).
C. Nonconforming lots (Subd. 5).
D. Nonconforming junkyards (Subd. 6).
E. Nonconforming rooming houses (Subd. 7).
F. Nonconforming parking surfaces (Subd. 8).

The degree of restriction made applicable to each category of non-conformity is generally related to the degree of incompatibility with permitted uses and the amount of investment typically associated with non-conformities of that type. Pursuant to Section 10.94, provision is made for relief from some of the restrictions of this Section when practical difficulties or particular hardship exist.

Subd. 3. Nonconforming Uses. The following restrictions shall apply to nonconforming uses of land.

AN ORDINANCE AMENDING CHAPTER 4 OF THE CITY CODE PROHIBITING ADULT USES ON PREMISES WITH LIQUOR LICENSES

WHEREAS, it is in the best interest of public health, safety and general welfare of the residents of the City of Mankato that adult uses be prohibited in premises holding on-sale liquor licenses and premises where the display and consumption of liquor is allowed; and

WHEREAS, the regulations set forth in this section are reflective of the prevailing community standards in the City; and

WHEREAS, adult uses when coupled with the serving of intoxicating liquor, wine or 3.2 malt liquor in public places encourages undesirable behavior and is not in the best interest of the City's public health, safety and general welfare; and

WHEREAS, The City Council of the City of Mankato desires to avoid the potential disturbances and potential adverse effects associated with adult uses on premises holding on-sale liquor, non-intoxicating malt liquor, wine or bottle club licenses; and

WHEREAS, allowing adult uses on premises holding on-sale liquor, non-intoxicating malt liquor, wine or bottle club licenses has a potential for increasing crime and lowering property values, and increases the potential for neighborhood blight; and

WHEREAS, it is not the intent of the City Council of the City of Mankato, to regulate the content of activities protected by either the United States of Minnesota Constitutions; and

WHEREAS, the regulations contained in this section are not intended to apply to any licensed premises which, prior to the effective date of the City's regulation of adult uses set forth in Section 10.83 of this Code, allowed such uses.

NOW, THEREFORE, BE IT ORDAINED by the Mankato City Council that the following ordinance is adopted:

Section 4.09. Adult Uses.

Subd. 1. Prohibition. It is unlawful for the holder of an on-sale liquor, non-intoxicating malt liquor, wine or bottle club license issued under this Chapter or for any manager, officer, agent, servant, or employee of such license holder to exhibit, allow, or permit on the licensed premises any adult use defined in Section 10.83, subd. 1 of this Code.

Subd. 2. Exceptions. This section does not apply to any license holder which, prior to August 26, 1996, lawfully allowed adult uses on the licensed premises.

This Ordinance shall in accordance with the provisions of Sections 2.14 and 5.06 of the Mankato City Charter, become effective thirty (30) days after publication of notice of its adoption.

Adopted this 11th day of October, 1999.

_____
Stan Christ
Mayor

Attest:_____
Jan Hepner
Acting City Clerk,

Deposition of Paul Vogel - 07/28/99

BZAPS, Inc., d/b/a Buster's Bar vs. City of Mankato

Page 1 to Page 53

CONDENSED TRANSCRIPT AND CONCORDANCE
800-873-3376

Southwest Reporters, Inc.,

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THE DEPOSITION OF PAUL VOGEL is taken on this 28th day of July, 1999, at the Manahan & Bluth Law Office, 416 South Front Street, Mankato, Minnesota, commencing at the hour of approximately 11:00 a.m. pursuant to NOTICE:

PAUL VOGEL,

called as a witness, being first duly sworn, was examined and testified on his oath as follows:

EXAMINATION BY MR. TIGUE:

Q Mr. Vogel, would you state your full name for the record.

A Paul Andrew Vogel.

Q Okay. And what is your present address?

A 205 West Eighth Street, Mankato, Minnesota.

Q Mr. Vogel, have you ever had your deposition taken before?

A Yes.

Q Okay. I'd just like to run through a couple of fairly simple ground rules here, most important of which is we have a court reporter transcribing what we're saying and talented as she is, she is incapable of transcribing two people talking at once. So the deal we have to make is I will promise not to ask you another question until you're done answering and you promise not to answer my question until I'm done asking it. Sound reasonable?

A Yes.

Q All right. Mr. Vogel, what is your present occupation?

A Planning and zoning administrator for the City of Mankato.

Q And, Mr. Vogel, how long have you held that position?

A Approximately two and a half years.

Q And could you tell me what your duties as planning and zoning administrator are.

A Supervise and coordinate the activities of planning, the planning function for the city, zoning administration and building inspections.

Q So you would be the chief enforcement officer for the zoning and building codes; correct?

A For the zoning codes.

Q For the zoning codes. And prior to your being zoning administrator for the last two and a half years, what did you do?

A I was also the associate planner and zoning administrator from I believe January of 1993 to the time I was promoted to my present position.

Q Okay. And, Mr. Vogel, what's your educational background?

A I have a Bachelor's of Science degree in earth science and geology and I have a Master's of Arts degree in physical planning from Mankato State University.

Q And when did you get your Master's degree?

A 1998.

Q Are you a member of any professional organizations?

A The Minnesota Planning Association.

MR. TIGUE: Why don't you mark this (indicating) as Exhibit 1.

(WHEREUPON, Deposition Exhibit 1 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Mr. Vogel, I'm showing you what has been marked for identification as Deposition Exhibit 1. Do you recognize this as an affidavit you submitted in this case?

A Yes.

Q I want to direct your attention to Paragraph 3 of your affidavit in which you said, "Prior to the adoption of Section 10.83, the City reviewed studies conducted by the

City of St. Paul, the City of Indianapolis and the City of Rochester dealing with adverse secondary effects from adult uses."

Before I get into discussing that particularly, were you the one who drafted the ordinance that you're speaking of here?

A Yes.

Q All right. And you were the one who personally reviewed the studies in question?

A Yes.

Q All right. Mr. Vogel, what do you as a planner think the adverse secondary effects of adult uses are?

A From reviewing the studies, the secondary adverse effects, there appear to be a correlation between the location of adult uses, reduced property values, residential property values, further deterioration of neighborhoods and also a correlation with an increase in crime.

Q And you were served with a subpoena duces tecum directing you to produce at the deposition the studies that you reference here in Paragraph 3. Have you brought those with you?

A Yes.

Q Why don't we take a look at them for a second.

MR. TIGUE: Why don't you mark this (indicating) as Exhibit 2.

(WHEREUPON, Deposition Exhibit 2 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Exhibit 2. That's one of the studies you produced from St. Paul, Minnesota, in 1987; is that correct?

A Yes.

Q Hand it back to me. I want to ask you about a particular part of the study. Mr. Vogel, I'm showing you Page 19 of Exhibit 2 and I want to direct your attention to the bottom of the page. And there's a portion of that study that suggests that the adverse secondary effects take place in the following manner and it begins with -- and I don't have it front of me, so I'm doing this by memory -- concentration of adult uses near residential areas and then it has an arrow below it; correct?

A Correct.

Q Then it says this leads to street prostitution and dangerous patrons; correct?

A Correct.

Q Arrow, this leads to other crimes, which then in turn leads to decline in property values and neighborhood deterioration.

A According to this copy, it just says other crimes.

Q Okay. But at least in theory the secondary effects go from concentration of adult entertainment, street prostitution and other crimes. Are you familiar with this as a theoretical construct of how adverse secondary effects take place?

A In this study, yes.

Q Are you familiar with any other theoretical constructs as to how adverse secondary effects take place from any of the other studies?

A Yes.

Q Okay. Could you describe what those are.

A Many of --. There weren't so much theoretical constructs. Some of the other studies contained correlations as to the locations of adult uses and then comparing the property values within study areas to property values in other controlled areas. And in

addition to crime, also comparing the crime within the study area to the controlled areas.

Q Okay. Hand that back to me. I'm directing your attention to Page 9 of Exhibit 2 where it lists the type of adult uses that were the subject of the study and it talked about two adults-only theaters, two adults-only bookstores, one adults-only cabaret, ten saunas or massage parlors and five bars with live entertainment; is that correct?

A Yes.

Q All right.

MR. TIGUE: Why don't you mark this (indicating) as Exhibit 3.

(WHEREUPON, Deposition Exhibit 3 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Deposition Exhibit 3. Do you recognize that as the Indianapolis study that you produced in this case?

A Yes.

Q All right. I'd direct your attention to Page 2 of the study and it discusses --. First of all, Exhibit 3 is a study in which they attempted to compare property values and crime statistics in control areas versus areas with adult entertainment; is that correct?

A I believe so.

Q All right. And it says that in two of the sites chosen one contained an adult book store, a massage parlor, an adult movie house and a topless bar. One had a topless bar, while the other harbored the White Front Bar which featured topless dancing. Another site contained two adult book stores and a massage parlor. Another site contained four massage parlors, two adult book stores, as well as a topless lounge.

Have I accurately described the nature of the uses that were studied there?

A Yes.

Q All right.

MR. TIGUE: Mark this (indicating) as Exhibit 4.

(WHEREUPON, Deposition Exhibit 4 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Exhibit 4. Do you recognize that as the Rochester Study that you produced in response to this request?

A Yes.

Q All right. Would it be fair to say the Rochester Study in and of itself does not contain any new studies at all but simply summarizes studies done in other jurisdictions?

A Correct.

Q All right. And the first study it mentions is Indianapolis, Indiana, and that's the same study that's referenced in Exhibit 3; is that correct?

A Correct.

Q All right. And the second study it references is St. Paul in 1978; is that correct?

A Correct.

Q All right.

MR. TIGUE: Why don't you mark this (indicating) as Exhibit 5.

(WHEREUPON, Deposition Exhibit 5 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Directing your attention to what has been marked for identification as Exhibit 5. Is that the study of St. Paul in 1978 that's referenced in Exhibit 4?

A Yes.

Q And is that a study that you relied upon in drafting this particular ordinance?

A Partially.

Q All right. Now, that is also a study that compared property values and crime with a control group and a study group; is that correct?

A I believe so.

Q And isn't it true that that study said that there is a positive correlation for a decline in property values and an increase in crime when you take groups, areas containing adult entertainment as compared to areas not containing adult entertainment?

In fact, let me direct your attention to a certain portion of the study. I direct your attention to I believe Page 18 of the study, which has a summary of findings. It says there's a positive correlation between decline in property values and an increase in crime in areas with adult entertainment and areas without adult entertainment; is that correct?

A Yes.

Q All right. Now, isn't it also true that the definition of adult entertainment contained in this study included both alcohol-serving establishments and establishments featuring sexually explicit entertainment?

A Well, it states that bars, x-rated theaters, book stores specializing in pornography, massage parlor.

Q All right. So it included in its definition of adult entertainment all liquor establishments and sexually explicit establishments?

MR. THOMSON: Just for the record, I mean the report speaks for itself, Randy, what it says and what it doesn't say. Go ahead and answer the question as best you understand it, Mr. Vogel.

A My understanding in reading the first paragraph is it was bars, x-rated establishments, book stores specializing in adult uses or featuring adult uses.

Q (By Mr. Tigue) I want to direct your attention back to Page 18 of Exhibit 5. It says, "When types of adult entertainment establishments are studied separately, this relationship", which is the positive correlation between deterioration and adult entertainment, "is found only for the alcohol-serving establishments, not for sexually oriented facilities." Did you read that?

A Yes, I read it.

Q All right. And so it would be fair to say that the 1978 St. Paul study says that the neighborhood deterioration is associated with alcohol-serving establishments and not with sexually oriented facilities?

MR. THOMSON: Same objection as before. The report speaks for itself. Go ahead and answer, if you can.

A It appears so in Stage I of the findings.

Q (By Mr. Tigue) All right. Now I'm directing your attention to Exhibit 4, which is the Rochester study. And, again, I'm directing your attention to Page 7 of the study. Do you find any mention made in the Rochester study of the fact that St. Paul found no correlation between sexually oriented businesses and neighborhood deterioration.

A The '87 or the '78 study?

Q The '78 study.

A It states that there is a correlation between the location of adult entertainment and neighborhood deterioration.

Q That's right. But actually the St. Paul study -- what the St. Paul study actually said is there's a correlation between adult entertainment and neighborhood deterioration only with respect to alcohol-serving establishments and not the sexually oriented businesses; isn't that correct?

MR. THOMSON: Same objection as the last one, but go ahead and answer it to the extent you can.

A Under Stage I of the findings it appears to say that.

Q (By Mr. Tigue) All right. Now, I want to direct your attention to Exhibits 2, 3, 4 and 5. Do you find anything in any of those three studies that would suggest that if a neighborhood convenience store were to make a single sale of a "Hustler" magazine, that those adverse secondary effects would occur?

MR. THOMSON: Same objections as last time. Go ahead.

A Without rereading them all, I can't answer that at this time.

Q (By Mr. Tigue) All right. Let me ask you this: Are you familiar with any study ever done anywhere in the United States of America that suggests if the neighborhood convenience store makes a single sale of a "Hustler" magazine that any of these adverse secondary effects would follow?

A As an accessory use and a planned use standpoint, no.

Q All right. Let me ask you the same questions concerning Exhibits 2 through 5 with a general release motion picture theater that on a single day makes a showing of an x-rated film. Is there anything in any of those studies that would suggest that a single showing of an x-rated film in a theater which 364 other days of the year shows general release movies would cause any of the adverse secondary effects set forth in those studies?

A Without rereading all of them, I'm unable to answer that.

Q Okay. Are you familiar with any studies or other evidence collected anywhere in the United States of America that would suggest if a single showing of an x-rated film were to occur at a theater which otherwise showed general release films that any of the adverse secondary effects occur?

A I'm not familiar with any study.

Q Let's assume for a moment you have an entertainment establishment that features live entertainment such as rock and roll bands or drama which on one day out of 365 were to show a live nude entertainment performance. First of all with, respect to Exhibits 2 through 5, do you recall anything in there that suggests that adverse secondary effects would occur were that to happen?

A No.

Q Okay. Are you familiar with any studies anywhere in the United States of America or any other evidence anywhere in the United States of America that would suggest that an entertainment facility which were to feature live music or live stage performances would one night of the year show a nude dance entertainment, that any adverse secondary effects would follow?

A No.

MR. TIGUE: Mark this (indicating) as the next exhibit.

(WHEREUPON, Deposition Exhibit 6 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Exhibit 6. Do you recognize this as the Mankato ordinance governing adult entertainment in the City of Mankato?

A Yes.

Q Okay. I want to direct your attention to the second page of the ordinance marked Page 104, Paragraph C. And it suggests, it defines the term adult uses-principal as a use, business or establishment having more than 10% of its stock in trade or floor area allocated to, or more than 20% of its gross receipts derived from, any adult use. You're familiar with that provision?

A Yes.

Q Now, as I understand the position the city has taken in this lawsuit, it is your belief that if on any given day an

establishment exceeds the 10 or 20 percent set forth in there, that would render that an adult use; is that correct?

A Correct.

Q All right. Let's suppose we have a convenience store which sells gasoline and which sells magazines, merchandise, a little bit of food, your typical 7-11, SuperAmerica type of convenience store. And let's assume that on its magazine rack behind sealed wrappers is one shelf of "Playboy", "Penthouse" and "Hustler' occupying less than one percent of its floor area.

As I understand your position, if on the beginning of the day a customer walks in and buys two "Hustler" magazines and a blizzard hits and it makes no more sales for the rest of the day, that 7-11 store is an adult use?

MR. THOMSON: Object to the form of the question as being argumentative, but you can answer.

A I would not interpret that to be an adult use.

Q (By Mr. Tigue) Well, 100 percent of its sales on a single day would be from adult material. Why would that not be an adult use under this definition?

A I believe I'm looking at the adult uses-principal and it says derived from any adult use.

Q All right. So if 100 percent of its sales on a given day were the sales of two "Hustler" magazines and assuming "Hustler" magazine would qualify as an adult use, why wouldn't that be an adult use? Why wouldn't that 7-11 store be an adult use under those circumstances, assuming on a given day 100 percent of its sales consist of the "Hustler" magazine sales?

A Well, from an enforcement standpoint, we would look at --my interpretation would be to look at the intent of what they were trying to do. It is beyond their control when the blizzard hit. What was their intent. Excuse me.

Q Let me pose it to you this way then: Assuming the situation I have just posed, would you believe that that 100 percent sale of adults-only materials would cause crime to increase in the neighborhood or property values to decline in the neighborhood?

A No.

Q All right. Let's take away the blizzard for a moment and just through the sheer force of Adam Smith's invisible hand, the market, there's a rūn on "Hustler" magazines that day and 15 percent of the sales that day consisted of "Hustler" magazines. Would that 7-11 store become an adult use as a result of that?

A 15 percent?

Q 15 percent on a day. Take away the blizzard.

A No.

Q Doesn't this say--. I'm sorry. Let's make it 21 percent.

A 21 percent?

Q Make it 21 percent. 21 percent of its gross receipts on that day came from "Hustler" magazines.

A According to the definition, it would be an adult use-principal, yes.

Q All right. Even. though no more than one percent of the floor area was allocated to adult uses and it just so happened that not too many people wanted to buy gas and on that day a lot of people wanted to buy "Hustler" it's an adult use-principal?

A According to the definition, yes.

Q All right. Assume the same hypothetical again. Would you believe that if that 21 percent of sales were to occur, that property values in the neighborhood would decline and crime would increase?

A My personal feeling?

Q Yes.

A No.

(WHEREUPON, Deposition Exhibit 7 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Exhibit 7. Do you recognize this as the minutes of a public meeting on the proposed zoning ordinance held September 18 of 1996?

A Yes.

Q All right. And I want to direct your attention to the bottom of the page, Comments and Points of Interest, Section 10.83 - Adult Uses. It says, "Mr. Vogel explained". First of all, that Mr. Vogel was you?

A Correct.

Q All right. "That the reason for the adult use part of the ordinance was to create same control for any adult uses that would want to locate in the city. He noted where adult uses would be able to locate and indicated that existing adult uses would be grandfathered in." I accurately read that?

A Correct.

Q All right. Now, you said that existing adult uses would be grandfathered in. First of all, were you familiar with what the existing adult uses were an that occasion?

A Under the proposed ordinance, yes.

Q All right. And what did you consider the existing adult uses as of September 18 of 1996?

A As defined by the ordinance would be Mettler's in downtown Mankato, Risque's along Madison Avenue, I believe to the 900 block, and the Adult Book & Cinema located on North River Front Drive.

Q Now, I note that you've brought a map with you in response to the subpoena duces tecum.

A Yes.

Q All right. Why don't we take a look at the map for a minute.

MR. THOMSON: We can do this on the record. Just so it's clear what we have, we brought a copy of the entire zoning map. This is the original (indicating). And we brought a large scale map showing the areas for adult uses.
MR. TIGUE: All right.
MR. THOMSON: But this (indicating) is the original and these are from the city's files; so we'd like to keep those. But he's also brought with him pieces. We can mark them as exhibits.
MR. TIGUE: Let's use these (indicating) as exhibits.
MR. THOMSON: Okay.
MR. TIGUE: Well, actually these don't have the zoning designations on them.
MR. THOMSON: No. But if you want to reference the zoning map, you can. But I don't think you need to mark it.
MR. TIGUE. I guess what I'd like to do --. Let's go off the record for a second.
MR. THOMSON: Okay.
(WHEREUPON, a brief recess was taken, after which the following transpired.)
(WHEREUPON, Deposition Exhibit 8 was marked for identification by the court reporter.)
MR. TIGUE: We can go back on the record.
Q (By Mr. Tigue) Mr. Vogel, I'm now showing you what has been marked for identification as Deposition Exhibit 8. Do you recognize this map as a copy of the official zoning map of the City of Mankato?
A Yes.
MR. MANAHAN: Is that a copy of the even larger one you just showed us?
THE WITNESS: The larger map is the map from 1996 that was used to delineate locations, possible locations when we were going through the ordinance.

MR. THOMSON: And what's Exhibit 8? What's the date on this one?
THE WITNESS: Exhibit 8, the date is January 1998.
MR. TIGUE: All right.
Q (By Mr. Tigue) Would Exhibit 8 be the most up-to-date version of the zoning map?
A As of January 1998, yes.
Q All right. I guess what I would like you to do is let's call Mettlers Adult Use No. 1, Risque's Adult Use No. 2 and the Adult Entertainment Center Adult Use No. 3. Could you with a pen on Exhibit 8 put a 1, 2 and 3 as to the locations of those establishments.
A Mettler's is 1?
Q Mettlers would be 1, Risque's would be 2 and the book store would be 3.
A (Witness complies with said request.)
Q All right. Now, directing your attention to the location you've designated by Mettler's for Mettler's Bar, that is in a zone marked CBD-C. That is not a permissible zone for locating adult uses under the new ordinance; is that correct?
A Correct.
Q And No. 2 is located in either a B-1 or a B-3 zone; is that correct?
A B-1.
Q B-1. And, again, that is not a permitted location for an adult use; is it?
A Correct.
Q And the book store is located in a B2 use; is that correct?
A Yes.
Q And, again, that's a permitted zone for an adult use is that correct?
A Yes.

Q It is located, however, within 350 feet of an R-2 use, isn't it?

A I believe it is further than 250 feet -- or 350 feet, excuse me.

Q All right. But at least two of the three uses are in locations that would be unlawful under the present ordinance; is that correct?

A Unless they were legally nonconforming.

Q And what renders them permissible is your statement here that all existing adult uses would be grandfathered in?

A The ordinance actually declares them to be legally nonconforming.

Q Now, you're familiar with the fact that in many adult entertainment zoning ordinances nonconforming uses are amortized over a period of months or years, correct?

A In some, yes.

Q The City of Mankato chose not to amortize existing adult uses; is that correct?

A Correct.

Q All right.

MR. TIGUE: Why don't you mark this (indicating) as Exhibit 9.

(WHEREUPON, Deposition Exhibit 9 was marked for identification by the court reporter.)

Q (By Mr. Tigue) I show you what has been marked for identification as Exhibit 9. This appears to be a summary of police calls to the various downtown bars in the City of Mankato from January 1995 to date. And it suggests that there have been far fewer police calls to Mettler's than to any of the other downtown bars. Is that a statistic that surprises you?

A Not really.

Q Okay. And, in fact, in terms of demand for police service and generating criminal activities, Mettler's, which

is an adult entertainment establishment, has the best record of any bar in Mankato; isn't that correct?

A I don't know that.

Q But in fact --. Let me ask you this. When you drafted the ordinance, did you have the belief that Mettler's generated any more crime than any other bar in the City of Mankato?

A No.

Q Okay. Did you have any evidence that property values around Mettler's declined or behaved any differently than property values surrounding any of these other bars?

A No.

Q Let me ask you the same question with respect to Adult Book & Cinema, do you have any evidence that that generates any more crime than any other commercial use in the City of Mankato?

A No.

Q Did you have any evidence that that establishment caused a decline in property values or property values around that facility behaved any differently than property values around any other commercial facility?

A No.

Q I ask you the same question with respect to the Risque establishment. Did you have any belief that property values surrounding Risque declined or behaved any differently than property values around any other commercial establishment?

A No.

Q Did you have any belief that Risque created more crime or greater demand on law enforcement resources than any other commercial establishment in the City of Mankato?

A No.

Q Okay. Would it be fair to say, that at least one of the reasons why you did not recommend amortization of non-

conforming uses in the City of Mankato is that you had no experience that the existing uses were in fact causing any adverse secondary effects?

A Partially.

Q Now, one of the establishments that you did not mention as a pre-existing adult use was an establishment formally called The Kato Ballroom and now called the Kato Entertainment Center. Is there a reason why you did not include that in your list of pre-existing adult entertainment establishments?

A In 1996?

Q In 1996.

A Because we did not know they had periodic adult uses or used the premises for adult uses on a periodic basis.

Q Now, are you familiar with the location of The Kato Ballroom?

A Yes.

Q All right. What I'd like you to do is take Exhibit 8 and mark The Kato Ballroom with a 4.

MR. MANAHAN: That's 200 Chestnut Street, if that's any help.

THE WITNESS: Thank you.

Q (By Mr. Tigue) You have marked No. 4, which appears to be in an M-1 zone, is that correct?

A Correct.

Q And an M-1 zone is a permissible location for adult entertainment; is that correct?

A Correct.

Q But it is also clearly within 350 feet of an R-1 zone; isn't that correct?

A Correct.

Q So as such it would not be a permissible use for adult entertainment?

A Unless it was legally nonconforming.

Q Okay. Did you regard this as a legally nonconforming use?

A In 1996, no.

Q Are you familiar with the fact that on April 29 of 1999 the Chippendales, which is a male dancing group similar in nature to the Fatal Attraction group that Mr. Torkelson hired, performed a one-night performance at The Kato Ballroom?

A Yes.

Q How did you become familiar with that?

A Actually through an ad, previous ad in the newspaper.

Q Did you take any legal action to prevent that performance from taking place?

A After the event, after I found out about the event, I called them and they stated that they had Chippendales on a periodic basis before 1996.

Q All right. Now, you've now experienced Chippendales having engaged in a one-night performance during your tenure as zoning administrator, correct?

A Correct.

Q Did you receive any reports of law enforcement problems resulting from the Chippendales' one-night performance?

A No.

Q Do you have any evidence that the property values around The Kato Center have deteriorated or behaved in any manner different from property values around any other commercial use in the city?

A No.

Q Do you have any evidence that the periodic appearance of the Chippendales' at The Kato Ballroom have caused

any of the adverse secondary effects which you identified as attributable to adult uses?

A No.

MR. TIGUE: Why don't you mark this (indicating) 10.

(WHEREUPON, Deposition Exhibit 10 was marked for identification by the court reporter.)

Q (By Mr. Tigue) I showing you what has been marked for identification as Exhibit 10. Do you recognize this as the provisions of the Mankato City Code governing the R-1, one-family dwelling district?

A Part of it.

Q All right. Now, the only home occupations --. I'm sorry. Directing your attention first to Subdivision 2, which lists the permitted uses in the R-1 zone, the only commercial use that is permitted are home occupations as regulated by Section 10.82. Am I reading that correctly?

A As accessory uses, yes.

Q And what types of regulations do you have for home occupations?

A Home occupations have to be clearly secondary and incidental to the use of the property for dwelling purposes. There's a series of standards that limit any outside storage for home occupations, limits any employees that would come to work on the premises for home occupations, limits them to be conducted entirely within the dwelling. No accessory building is to be used. And then there's several home occupation that are listed as prohibited home occupations, I believe such as car repair, contractors, roofing, et cetera.

Q Okay. Let's just take an R-1 area here (indicating). I can't read this.

A That's Orchard Road.

Q Orchard Road. All right. Let's assume for a moment a developer came to you and said, "I'd just love to put a

Wal-Mart store on Orchard Road." What would your response to that be under the zoning code?

A And the land use plan?

Q Yeah.

A It wouldn't conform with the goals of the land use plan and it wouldn't conform with the zoning map designation.

Q All right. So a Wal-Mart store open 24 hours a day would simply not he permitted there on Orchard Road where I pointed out to you?

A Under its present zoning, no.

Q All right. Now, would it be fair to say that locating a Wal-Mart store on Orchard Road would itself cause some adverse secondary effects; wouldn't it?

A It could, yes.

Q Obviously you'd have a huge increase in vehicular traffic in that area; wouldn't you?

A The area is not designed for commercial use.

Q All right. But if you were to put a Wal-Mart store there, you'd have a huge increase in vehicular traffic; wouldn't you?

A Most likely.

Q A huge problem of parking; correct?

A It depends how much off street parking they would provide.

Q You'd obviously have a massive increase on the demand for utilities; wouldn't you?

A Yes.

Q And you'd probably have an increase in crime, wouldn't you? A Wal-Mart store is certainly going to generate more criminal activity in terms of shoplifting or pockets being picked or traffic accidents than a single family dwelling; wouldn't it?

A It may.

Q And obviously one of the reasons you don't put a Wal-Mart store in a residential area as a planner is a Wal-Mart store has those kind of secondary effects when located in a residential area; fair to say?

A In part, yes.

Q All right. Well, let's forget about the Wal-Mart store for a moment and go right back here to Orchard Drive and instead of putting a Wal-Mart store in there, Grandma Jones who lives there on Orchard Drive decides to have a garage sale on the weekend. Let's assume she sells clothing just like Wal-Mart, kids' toys just like Wal-Mart and maybe even a couple of used bicycles. What's the likelihood that you would prosecute Grandma Jones for violating the zoning ordinance?

A None since it's allowed under the zoning ordinance, under the sign ordinance.

Q Well, under the sign ordinance. But she's obviously engaging in retail sales; isn't she?

A Yes.

Q And retail sales certainly is not a permitted use under the zoning ordinance; is it?

A Unless it's done as a home occupation, no, in a residential zoning district.

Q Okay. But, in fact, it's fair to say that if you were to go into an R-1 zone on any weekend during the summer, you would see garage sales taking place all over the R-1 zone; wouldn't you?

A In some locations as accessory uses, yes.

Q And it would be fair to say that you as a zoning administrator would look at Grandma Jones conducting a one or two-day garage sale as something materially different from a Wal-Mart store open 24 hours a day, wouldn't you?

A Yes.

Q And one of the reasons you would look at it that way is that the secondary effects that we talked about from a 24-hour-a-day Wal-Mart store opening upon Orchard Avenue are materially different in both quantity and quality than the secondary effects that would flow from Grandma Jones having a one or two-day garage sale?

A As compared to a principal use to an accessory use of property, yes.

Q Now, the other item I asked you to bring was the map that you prepared showing the permissible locations of adult entertainment under the zoning ordinance; is that correct?

A Yes.

Q All right.

MR. THOMSON: This (indicating) is the big one. These three pages (indicating) show, all of the areas. This is the original. Those (indicating) are the ones we'd like to use as an exhibit; but you can certainly reference this (indicating) if you wanted to.

Q (By Mr. Tigue) I guess what I would like to do rather than try to deal with these (indicating) is I would like you in pencil to circle these locations on Exhibit 8 for a moment. Why don't you use a red pencil.

A Pencil or pen?

Q I don't care.

MR. TIGUE: And, again, we can go off the record while you're doing this.

THE WITNESS: That's fine.

(WHEREUPON, a brief recess was taken, after which the following transpired.)

MR. TIGUE: We can go back on the record.

Q (By Mr. Tigue) Mr. Vogel, you've designated some areas in red that you believe are permissible locations for an adult use. I want to direct your attention to -- and I can't

remember the exhibit -- but It's the zoning ordinance, the adult entertainment zoning ordinance. Directing your attention to the third page marked 106. And for point of reference; that's Exhibit 6.

A Yes.

Q It says, "An adult use-principal shall be located" --. And I'm looking at Subdivision 4, Paragraph B. "An adult use-principal shall be located at least 350 radial feet, as measured in the straight line from the closest point of the property line of the building upon which the adult use-principal is located to the property line of", a No. 1 is a zoning district in which residential uses are specifically listed as a permitted or conditional use.

Okay. What zoning districts did you consider to fall within that prohibition?

A The residential districts, R-1 through office residential, the central business districts and I believe B-1. I believe also M-2 contains some provisions for dwellings as long as they're accessory.

Q All right.

MR. TIGUE: Would you mark this.

(WHEREUPON, Deposition Exhibit 11 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Deposition Exhibit 11. Do you recognize this as part of the zoning ordinance governing the B-1 district?

A Yes.

Q All right. And Subdivision 3 lists as a conditional use, "Apartments or dwelling units, when located above the ground floor." So you would be in agreement that an adult use could not be located within 350 feet of any B-1 district?

A Correct.

Q Now, isn't it also true -- I may not have it copied here -- that one of the permitted uses in a B-3 district is any use listed as permitted under B-1?

A Correct.

MR. TIGUE: All right. Then let's mark this (indicating).

(WHEREUPON, Deposition Exhibit 12 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Exhibit 12. Do you see this as the conditional uses for the B-3 district?

A Correct.

Q I'm directing your attention to Sub-Paragraph K. A conditional use is, "Other commercial and residential uses determined by the Planning Agency to be of the same character as the permitted or conditional uses above, and found not to be detrimental to existing uses and to the general public health, safety and welfare." Do you see that?

A Yes.

Q So isn't it true that the planning commission can as a conditional use permit residential use in a B-3 zone if they are similar in character to the uses permitted in the B-1 zone and wouldn't adversely effect health, safety and welfare?

A They may.

Q All right. So, in fact, residential uses are permitted as a conditional use in a B-3 zone as well as a B-1?

A Conditionally.

Q And, again, if the district is within 350 feet of a B-3 use?

A Basically it would affect this one (indicating).

Q So, In fact, directing your attention to the M-1 use, it appears that you would have to take at least the first 350

feet to the west of the B-3 border and eliminate that for adult uses?

A Correct.

(WHEREUPON, Deposition Exhibit 13 was marked for identification by the court reporter.)

Q (By Mr. Tigue) Showing you what has been marked for identification as Exhibit 13. Do you recognize this as the Mankato ordinance governing the permissible conditional uses in an M-1 district?

A Yes.

Q All right. And one of the conditional uses is uses listed as conditional uses in the PI, Planned Industrial District?

A Correct.

Q All right. MR. TIGUE: Mark this (indicating).

(WHEREUPON, Deposition Exhibit 14 was marked for identification by the court reporter.)

Q (By Mr. Tigue) I'm showing you what has been marked for identification as Exhibit 14. Do you recognize this as the Mankato ordinance governing conditional uses in the PI district?

A Yes.

Q I want to direct your attention to Subparagraph B of Subdivision 3. It lists as a conditional use, "Dwelling units provided for employees, including their families, having duties in connection with any premises requiring them to reside on the premises." Do you see that?

A Yes.

Q So, in fact, this residential use, which is dwellings for employees, is a conditional use in the PI district; is that correct?

MR. THOMSON: Objection, misstates the evidence. It doesn't use the phrase residential use. It uses the phrase dwelling units. But go ahead and answer the question the best you can.

A State the question again.

Q (By Mr. Tigue) Well, let me ask you this: Is there any question in your mind that a dwelling unit is a residential use?

A In the context of this ordinance I believe it's part of dwelling units provided for employees, including their families, having duties in connection with any premises requiring them to reside on. And since this an industrial district, I believe it would be in connection with an industrial use.

Q I understand that. But isn't it clear that a dwelling unit is where somebody lives?

A Correct. My interpretation would be it would be accessory to an industrial use.

Q But it's clearly a residential use. People are residing there; aren't they?

A As an accessory to an industrial, yes.

Q If we were to assume that this particular use is in fact a residential use, then the M-1 district itself would be one in which a dwelling unit -- or a residential use was a conditional use; is that correct?

A In connection with an industrial use as accessory.

Q If we were to assume that as a residential use, then none of the M-1 districts would be a permissible location for adult uses; would they?

A No, they're listed as adult use-principles shall be permitted in the B-2 and M-1 light industrial districts.

Q Subject to the other qualifications, one of which is you can't be within 350 feet of a district in which residential uses are permitted as a condition use. Now, if we assumed, if we assumed that dwelling units in an M-1 district are a residential use, isn't it true that none of the M-1 districts would therefore be eligible for location of adult uses?

MR. THOMSON: Excuse me. I would object. No. 1, It's speculative. No. 2, you're asking him I think for an expert witness based testimony based on an assumed set of facts where there's no facts to support it. But go ahead and answer the question the best you can, Mr. Vogel.

A M-1 districts serve as permissible areas for adult uses under the ordinance.

Q (By Mr. Tigue) But let's assume --. If you grant me the assumption that one of the qualifications is that you can't be within 350 feet of any district in which residential uses are permitted as a conditional use, if you assume that residential uses are permitted as a conditional use in M-1, that would disqualify all M-1's from adult zoning, from being permissible locations for adult business; is that correct?

MR. THOMSON: Same objection as the last question, but answer It the best you can.

A No.

Q (By Mr. Tigue) All right. It is certainly within --. All right. Let's grant the assumption for a moment that residential uses are permitted in M-1. Would it be fair to say then that no adult uses would be permitted within 350 feet of an M-1 district?

MR. THOMSON: Same objection.

A Under the ordinance, adult uses would be allowed in the M-1.

Q (By Mr. Tigue) You're not answering the question. The question is: If you assume that residential uses are permitted as conditional uses in the M-1, doesn't the adult entertainment ordinance prohibit the location of adult uses within 350 feet of an M-1 district?

MR. THOMSON: Same objection as the last question. Go ahead and answer if you can.

A I'm not assuming that because that's not what the ordinance says. The ordinance states that adult uses are permitted in the M-1 district and then within the M-1 they have to be located 350 feet from other zoning districts in which residential uses are permitted.

Q (By Mr. Tigue) All right. If you were to concede for the purpose of argument or discussion here that residential uses are a conditional use in M-1, doesn't that invoke the disqualification provision of being within 350 feet of a district in which residential uses are permitted?

MR. THOMSON: Same objection as the previous questions, but answer it if you can.

A No. I believe that they're allowed, they're permitted in the M-1 district as long as they're 350 feet from another zoning district.

Q (By Mr. Tigue) Let's set aside the issue of whether they're permitted within the M-1 district. I'm asking are they permitted 350 feet away from an M-1 district, if you were to assume that M-1 permits residential uses as a conditional use.

MR. THOMSON: Same objection.

A Our interpretation is that those residential uses are accessory and they would be allowed within 350 feet of an M-1 district if located within a B-2 or another M-1 district.

Q (By Mr. Tigue) Okay. Directing your attention back to Exhibit 6, Page 106, Subdivision 4 B-1. Is there anything in Subparagraph 1 that when it says, "A zoning district in which residential uses are specifically listed as a permitted or conditional use", is there any qualification that exempts accessory use from the language of that ordinance?

A No, but it doesn't list accessory uses either.

Q I want to direct your attention to the map as Exhibit 8. Let's go through on the top of the exhibit right where

you've marked No. 3, that's the location of the existing adult book store; is that correct?

A Correct.

Q It would be fair to say that under the terms of the ordinance, no adult use may locate within 350 feet of No. 3?

A Correct.

Q Would it be fair to say that all of the area in red in this corner (indicating) of the map is within 350 feet of No. 3, would that be correct?

A Without measuring it I don't know.

Q Would it be fair to say that it is all within 350 feet of an M-1 zone?

A It would be fair to say that.

Q All right. I'm going to the south here (indicating). Is it, your position that The Kato Ballroom is now a nonconforming adult use?

A Yes.

Q All right. Would It be fair to say that the area that you have circled is for the most part within 350 feet of The Kati Ballroom?

A Without measuring it, some of it would be.

Q All right. So some of that area would be disqualified?

A Some.

Q All right. If you were to assume that an M-1 use were a disqualifying use, all of that area would be within 350 feet of an M-1 use, wouldn't it -- of an M-1 district? I'm sorry.

A If I was to assume.

MR. THOMSON: Could we just ask him if all of that area is within 350 feet.

Q (By Mr. Tigue) All of this area around No. 4 is within 350 feet of an M-1 district; isn't it?

A Correct.

Q All right. I'm showing you an area in an area marked M-1. We've already established that you have to take 350 feet from a B-3 district and that would eliminate most of that area, wouldn't it, or much of that area; wouldn't it?

A It would eliminate part of it, but not all of it.

Q And I believe your testimony was that some residential uses are permitted as a conditional use in an M-2 district as well; is that correct?

A In an M-2?

Q In an M-2.

A I don't believe I said that.

Q All right. Let's take a look at the M-2 district for a minute then. Isn't it true that an M-2 district permits any use, any conditional use permitted in an M-1 district?

A Correct.

Q All right. And if we assume residential uses are a conditional use in an M-1, they would also be conditional uses in an M-2?

A As accessory.

Q All right. And isn't it true that a substantial portion of the area in an M-1 district is within 350 feet of an M-2 district?

A Part of it.

Q Directing your attention to the upper left-hand corner of the map. There is a B-2 district, a small B-2 district among two larger ones. Would it be fair to say that all of the B-2 district that is in the middle of the two larger ones is within 350 feet of an M-1 district -- I'm sorry, an M-2 district?

A Yes.

Q And the area immediately below it is in large measure within 350 feet of an M-2 district to its immediate right?

A Parts of it.

Q Now, the other thing I want to note is, if we get Exhibit 6 back in front of you, again, let's go back to Page 106. It

says, "Adult use-principal shall be located at least 350 feet radial feet, as measured in a straight line from the closest point of the property line of the building upon which the adult use-principal is located to the property line of". So it would be fair to say that you measure that 350 feet from the property line; is that correct?

A Correct.

Q And if any portion of the lot falls within that 350 feet, the entire lot is disqualified; isn't it?

A Correct.

Q And directing your attention to the upper-most portion of the left-hand corner of the map, the bottom portion of the B-2 district is within 350 feet of the M-2 district below it; is that correct?

A Parts of it.

Q All right. I just may have one other question here.

MR. TIGUE: I believe that's all the questions I have.

MR. THOMSON: I just have one point to clarify.

MR. TIGUE: All right.

EXAMINATION BY MR. THOMSON:

Q Mr. Vogel, could you look at Exhibit 6, please. You identified that as the adult use ordinance. Isn't it accurate to say that that was the version that was before the planning commission, not the one that was ultimately adopted before the city council?

A Yeah, I believe so. I see under General Provisions, yes.

Q For example, do you see where it says B-3 that it's stricken out and there's a 2 written above it?

A Sure, yes.

Q I just wanted to clarify that for the record that that's not the final version that was adopted. So if we use any exhibits in the future, we make sure we use the right one.

A Below the General Provisions under Adult Uses, Principal there's a slash.

MR. THOMSON: Okay. That's all the questions I have. We'll read and sign.

(WITNESS EXCUSED)

(WHEREUPON, at approximately 12:35 o'clock p.m. the foregoing deposition was concluded.)

(The ORIGINAL EXHIBITS were attached to the original transcript and copies supplied to both counsel.)

(The ORIGINAL TRANSCRIPT was provided to MR. TIGUE and copies to MR. TIGUE and MR. THOMSON.)

(END OF RECORD)

CORRECTIONS

I, Paul Vogel, have read the foregoing pages 1 - 51, inclusive and have made any and all corrections of errors which I feel the Court Reporter has made in taking and transcribing my testimony.

_____

Signature

_____

Notary Public

#0728a9CT

STATE OF MINNESOTA CERTIFICATE
COUNTY OF SCOTT

I, CINDY M. TRATTLES hereby certify that I reported the deposition of PAUL VOGEL on the 28th day of July, 1999, in Mankato, Minnesota, and that the witness was by me first duly sworn to tell the truth, the whole truth and nothing but the truth concerning the matter in controversy aforesaid;

That I was then and there a Notary Public in and for the County of Scott, State of Minnesota; That by virtue thereof I was duly authorized to administer an oath;

That the foregoing transcript of 52 pages is a true and correct transcript of my stenographic notes in said matter, transcribed under my direction and control; That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That the reading and signing of the deposition by the said witness was not waived;

That I am not related to nor an employee of any of the attorneys or parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in the outcome of the action and have no contract with the parties, attorneys or persons with an interest in the action that affect or has a substantial tendency to affect my impartiality;

WITNESS MY HAND AND SEAL this 3rd day of August, 1999.

_____

Notary Public

PAT HENGTES, CITY MANAGER: Next item is an ordinance amending Chapter 4 of the City Code prohibiting adult uses on premises with liquor licenses.

This ordinance comes by way of the recommendation by the League of Minnesota Cities in conjunction with an ordinance that was passed by Blue Earth County very similar to this, approximately six to eight months ago. At that time..I guess I should go back about three..two or three years, the city had an ordinance concerning adult uses. We considered that after a long debate and research. Refinement to this ordinance in the area essentially has come by way of Blue Earth County proposing prohibitions of adult uses on liquor premises. We researched it further with the League of Minnesota Cities and it was recommended that we develop a companion ordinance to both theirs and our current adult uses ordinances.

So with that, we have an obligation to have a public hearing. Essentially what the ordinance lays out is that it is unlawful for a holder of an on-sale liquor, non-intoxicating malt liquor, wine, bottle club license issued under this chapter or for any manager, officer, agent, servant, or employee of such license holder to exhibit, allow or permit license holders of any adult uses defined in the section of the code. Additionally, this exemption...we have an exemption provision that does not apply to this section to simply licenses that have allowed adult uses...do allow adult uses as of August 25, '96, which I believe would be the Mettlers and the Kato Entertainment Center which would be two uses that have either regularly or periodically allowed adults uses by definition on their property.

So this is a public hearing, city attorney is here to answer any further questions and of course this is a pubic hearing and we're asking for consideration.

This is a public hearing, anybody wish to address the Council, please come forward.

RANDALL TIGUE:
Good evening members of the Council, my name is Randall Tigue, I am an attorney representing Buster's Bar.

MAYOR LEONARD CRIST:
I need an address please.

TIGUE:
I'm in Minneapolis, Minnesota, Karmel Square Building, Suite 200, I represent Buster's Bar in the City of Mankato. Notwithstanding what you just heard, this ordinance is about Buster's Bar. About one year ago, Buster's which generally features live bands on weekends, decided to put on a one night show consisting of Fatal Attraction, which is a group of male dancers similar to the Chippendales, and similar to what you saw in the movie Full Monty. Mr. Vogel told my client that he went forward with a one night show of Fatal Attraction, he would be prosecuted under the adult entertainment zoning ordinance because the bar is not located in the adult entertainment zone. We promptly sued in federal court saying this construction of the ordinance violates the First Amendment. This is being proposed, but for no other purpose than to hedge the city's bet on our lawsuit and outlaw a one night show of Fatal Attraction regardless of what happens in our lawsuit.

I would like to address myself specifically to the "whereas" clauses which I will hope to see if we can that on the overhead.

The highlighted "whereas" clauses state "whereas the adult uses when coupled with intoxicating liquor, wine, 3.2 malt liquor encourages undesirable behavior and is not in the best interest of the city's public health, safety and general welfare. Whereas the City Council of Mankato desires to avoid the potential of disturbances and potential adverse effects associated with adult uses on the premises holding on-sale liquor, non-intoxicating malt liquor, wine or bottle club licenses, and whereas allowing adult uses on premises holding on-sale liquor, non-intoxicating liquor, wine, or bottle club licenses have the potential for increasing crime and lowering property values and increases the potential for neighborhood blight, etc. I am here to suggest that not only does your professional staff not believe that to be true, your Planning Director has testified under oath that none of that is true. I have for your consideration and I'll pass them out to members of the council, copies of the deposition of Paul Vogel, the City Planning Director taken during the course of our litigation in which we discussed with Mr. Vogel all of these allegations concerning adverse secondary effects of adult entertainment and I tabbed Mr. Vogel's deposition at various locations and the first one I would like to direct your attention to is what appears on page 18 of the deposition.

I asked Mr. Vogel the question, are you familiar with any studies or other evidence collected anywhere in the United States that would suggest that a single showing of an x-rated film were to occur at a theaters which otherwise shows general release films that any adverse secondary effects occur, he says, No I am not familiar with such a study. I said let's

assume for a moment that you have an entertainment establishment that features live entertainment such as rock and roll bands or drama and on one day out of 365 were to show a live nude entertainment performance. Do you recall any studies that say any adverse secondary effects would happen? Again the answer is no. Are you familiar with any studies anywhere in America which would suggest that adverse secondary effects would occur in such circumstances? His answer is no. I would then direct your attention to page 23 of the deposition. I said now when you first adopted an adult entertainment zoning ordinance, what adult entertainment did you have in the City of Mankato? And he says Mettlers, Risque's, and Adult Book and Cinema on north Riverfront Drive. If you flip to the next page we have this highlighted section. First of all before we get to the highlighted section, we pointed out in exhibits listing police calls to the various bars in the City of Mankato, and we pointed out that Mettlers, with adult entertainment, had fewer police calls than any other bar in the city. I asked Mr. Vogel, Does that surprise you? And he says no. We then asked him when you drafted the ordinance did you believe that Mettler's generated any more crime than any other environment in the city, and he says no. Did you have any evidence that property values around Mettler's declined or behaved any differently than property values around any other bar in the city? Answer, no. I asked him the same question with respect to an Adult Book and Cinema, and again his answer was no. Now we then pointed out that Chippendales, a group very similar to Fatal Attraction had performed over the years at Kato's, again which was not zoned for adult entertainment. And I said after you had all of these performances, did you have any reports of law enforcement problems resulting from the Chippendales one-night performance, and again this is a place licensed to sell liquor? His answer was no. Do you have any evidence that

property values around Kato's deteriorated or behaved in any manner different from property values around any other commercial use in the city? Again his answer was no. Do you have any evidence that the period appearances of Chippendales at Kato's have caused any of the adverse secondary effects which he has attributed to adult uses? Again his answer was no. So I would suggest to you this has nothing to do with adverse secondary effects, has nothing to do with protecting crime, has nothing to do with preserving property values or preventing urban blight.

It is simply an effort to make sure that my client can't invite Fatal Attraction for a one night show in Buster's Bar. And I guess my simple request is that if this ordinance is adopted that all of you have the personal and professional integrity to be honest about what you do.

This isn't about property values and it isn't about crime, isn't about adverse secondary effects because not even your Planning Director believes that this ordinance has anything to do with that. It's about attempting to censor a one night performance of a popular male dance performance at my client's bar, and if you adopt this resolution, be honest enough to say that is what you're doing.

MAYOR CRIST:
Thank you. Anyone else wish to address the Council. Anyone else? Hearing none, I'll close the public hearing. What are your wishes?

UNIDENTIFIED COUNCIL MEMBER:
Move the recommendation.

KATHLEEN SHERAN:
Second.

MAYOR CRIST:
Any discussion?

SHERAN:
I had a question. Blue Earth County adopted a resolution that this is based on, an ordinance that this is based on. Have we incorporated all of the language of that ordinance?

CITY ATTORNEY KATHLEEN WELLS:
No, I believe they also require a specific license of adult uses, That is not something that we require, It is not a separate adult use, we don't have a separate adult use license, but other than that I believe in the ordinances that the city has enacted an the county has enacted are pretty much in synch, except for the liquor prohibiting licensed liquor establishments.

MAYOR CRIST:
Ed, you had a question.

EDGAR TWEDT:
I had a couple of questions. subdivision 2 of this section does not apply to any license holder, prior to August, and so on. Is that because those who held the licenses prior to August, '96 that that would not cause potential disturbances and potential adverse effects and the ones after that will cause.

WELLS:
No, it's because of when we enacted the adult use ordinance or that was the effective date of the adult use ordinance and the establishments were already in place, and it's unconstitutional for us to zone them out of business. So it's a concession we have to make for all existing businesses.

TWEDT:
I guess I do have a couple of questions If I might support an ordinance amendment, but I'm troubled to about the 'whereases' that have no documented support which the attorney who just spoke to us has brought to our attention. No documented evidence that it encourages undesirable behavior, no documented evidence of several of the things that are laid out here. And so it's either the whole thing or none, and while I might support an ordinance, I can't support that language unless it gets cleaned up a little bit. I have a real hard time with that. I can't support an ordinance that has language in it that I think has no...there may evidence to support it, but it certainly has not been presented to us. Um, so I would like to propose that we table this until....I won't use table because that's not debatable...that we postpone it until a staff has had time to work with the language a little more.

HENTGES:
We certainly can go back to a lot of the development of the adult uses which I don't .....

TWEDT:
We don't have a second of my motion.

HENTGES:
I'm Sorry, I apologize.

TWEDT:
Motion to postpone until this language be reviewed a little closer.

I'll second that.

MAYOR CRIST:
Okay, we have a motion and a second.

HENTGES:
We certainly can go back and recompile that information. We have though, Mr. Vogel's deposition certainly....went in the direction that part and parcel Mr. Tigue's felt doesn't support this ordinance. But we've went through a long history of adult...or the original adult uses ordinance working very closely with the League of Minnesota Cities and the development of that ordinance. We can recompile a lot of that information. I believe the ordinance as we proposed it, is quite consistent with the background and a lot of the discussions we had then with the first phase or the original phase of this ordinance and we certainly can go back through that. You know there may be instances with some of the current uses out in Mankato that are experienced doesn't maybe support or parallel the experiences in other cities or what the League has put forth or counseled to us but we certainly can go back to a lot of that history if the Council so wishes into that at the next meeting, but I indicate that we went through this with along extensive process with the League in the first ordinance development.

TWEDT:
I don't want to have my motion to postpone until it can be looked, to be misunderstood as some kind of support for this, but when claims like this are made in resolution there should be just all kinds of sociological research that can support statements like increases of potential for neighborhood blight, and all I'm suggesting is we hadn't seen any of that here tonight and I'm leery about voting yes on a proposal until I see ...I suppose it's the old the university professor in that one likes to see evidence before one makes a decision.

HENTGES:
We can certainly put that together.

TWEDT:
Well, that's why I'm moving to postpone until we can do that.

JACK CONSIDINE:
What's wrong with that, I like what he says, yes, we don't want to have it here, all right, plain and simple.

SHERAN:
The issue that Ed raises...I just want to speak on that. That what was read to us from the deposition asking Paul specifically to cite studies that's very different than saying, the conclusion that I heard was that it meant that Paul didn't believe that those things happened, and that is drawing a very erroneous...a potentially very erroneous conclusion from those questions. Question was do you know studies, not anything more in terms of a belief system. The issue in the past has come in front of us, and the law has been interpreted to us about this is that each community did not have to reestablish what had been established by other communities and communities have established the difficulty, therefore, rather than requiring every community to go over and over this, we're allowed to use the existing findings to justify adult use ordinances. And I am not objecting Ed at all to having that stuff be reviewed by this Council. But I wouldn't want to leave this meeting with the impression that there is not a basis for this decision because there is, and the League of Minnesota Cities representing all cities is very clear that we are thoroughly within our rights to establish this kind of an ordinance.

MAYOR CRIST:
John you had a question.

JOHN BRADY:
I support this ordinance because I believe this ordinance, and this has nothing to do with the city's stand in any lawsuit that may be pending and whether or not Mr. Vogel believes that...I don't think I agree with Kathy from the comments that are made since he failed to cite specific studies, but I believe in this ordinance and I support it.

MAYOR CRIST:
Ed.

TWEDT:
Why, Kathy and John and I all agree on that point that's a wrong inference to draw and I think the rules of inference sort of cut that to shreds and I hear what you say Kathy about that things have been established that we should follow them. All I'm saying is that I haven't seen any of that tonight to back that, and I certainly would like to see some of that before I say yes to this. I'm kinda like Jack. I take the view "why do we want it?" and my view is what we don't want, but I have to set that aside when I look at the language of an ordinance that is the so-called supportive language. This is not in any way an attack on the staff. I think our staff does a great job and I appreciate that. But it's my vote that support that and I have to see more evidence than that, and that's why I propose to postpone that.

HENTGES:
Mr. Mayor, I would just note, and again, from our vantage point, we certainly can pull together, as Mr. Vogel cited in the same deposition that you looked at, the Rochester study, St.

Paul study, that Mr. Tigue, and we certainly pull that information together along with a lot of the other League research that was pulled together, and get that to the Council before the next meeting.

ANNE GANEY:
It sounds like I'm agreeing with everyone when I say that I'm agreeing that...I don't think the deposition showed that Mr. Vogel didn't know...I think there are plenty of studies that exist linking our "whereases" together. Also, most of the adult uses in the city are in my ward and I hear about them. Residents in my ward, and what I hear is they wish we could do away with the ones that are there now and they certainly don't want more that the reason I'll be supporting this ordinance.

MAYOR CRIST:
Anymore discussion? We have a motion and a second? Any other comments or discussion?

TWEDT:
The motion is to postpone until the staff can bring us a little more supporting documentation.

MAYOR CRIST:
Everybody understand the motion?

Why don't we take roll call. Clerk please call the roll.

CLERK:
Mr. Brady?

BRADY:
No.

CLERK:
Ms. Sheran?

SHERAN:
No.

CLERK:
Mr. Considine?

CONSIDINE:
Yes.

CLERK:
Mr. Twedt?

TWEDT:
Yes.

CLERK:
Mr. Ganey?

GANEY:
No.

CLERK:
Mr. Freyberg?

GREYBERG:
No.

MAYOR CRIST:
Ed's motion is defeated. We do have a motion on the floor to pass the ordinance. Any further discussion on that?

CONSIDINE:
Again, I agree with...yeah, we don't want to have it here.....along those lines, it's not something we find desirable for the community.

MAYOR CRIST:
Any other discussions? Will the clerk please call the roll:

CLERK:
Mr. Brady?

BRADY:
Yes.

CLERK:
Mr. Sheran?

SHARAN:
Yes.

CLERK:
Mr. Considine?

CONSIDINE:
Yes.

CLERK:
Mr. Twedt?

TWEDT:
Present.

CLERK:
Mr. Ganey?

GANEY:
Yes.

CLERK:
Mr. Freyberg?

FREYBERG:
Yes.

CLERK: Mayor
Crist?

MAYER CRIST:
Yes.

UNITED STATE DISTRICT COURT
DISTRICT OF MINNESOTA

BZAPS, Inc., d/b/a
Buster's Bar,

Plaintiff,

AFFIDAVIT OF PATRICIA DACUNHA

vs.

City of Mankato,
a municipal corporation,

Court File No.
98-2588PAM/JGL

Defendant.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Patricia Dacunha, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is employed as a paralegal by Randall Tigue Law Offices, P.A.

2. Your affiant was assigned a job of ascertaining whether and when the mail dance revue known as the "Chippendales," a group which features semi-nude dance performers similar in nature to "Fatal Attraction," which is the subject of the present lawsuit, has ever performed at the

Historic State Theater at 805 Hennepin Avenue South in Downtown, Minneapolis.

3. Your affiant ascertained, through contact with management at the Historic State Theater and from publicly available advertising records, that the Chipppendales performed at the Historic State Theater on November 1, 1995.

4. Attached hereto as Exhibit A are various newspaper advertisements from calendar year 1995, advertising the performance of the Chippendales at the Historic State Theater.

5. Your affiant also obtained from the Historic State Theater its published schedule of upcoming events from January - March, 2000, a copy of which is attached hereto as Exhibit B, plainly indicating that the Historic State Theater is anything but an adult entertainment venue.

6. Your affiant was also asked to ascertain, from publicly available records, whether the one-night performance of the "Chippendales" had any appreciable effect, either upon the State Theater itself or upon surrounding properties, in terms of demand for police services or decline in property values.

7. Your affiant obtained publicly available data concerning demand for police services from the RECAP Unit of the Minneapolis Police Department, the unit of the police department which maintains statistics on the date, time and nature of police calls to various addresses in the City of Minneapolis.

8. Attached hereto as Exhibit C is the RECAP Unit's record of police calls to the Historic State Theater in calendar year 1995.

9. Attached hereto as Exhibit D is the RECAP Unit's record of police calls for calendar year 1995 for the Historic Orpheum Theater, located approximately one block away at 910 Hennepin Avenue South, for the same calendar year.

10. Attached hereto as Exhibit E are comparable RECAP Unit's for calendar year 1995 for other properties in the vicinity of the Historic State Theater.

11. Your affiant was also requested to examine the Historic State Theater in terms of whether or not it and the surrounding property have suffered a decline in property values, as relates to the one-time appearance of the Chippendales on November 1, 1995.

12. Your affiant did this by obtaining publicly available data on the value of the State Theater building and the surrounding properties over a period of time from the office of the Minneapolis City Assessor.

13. Attached hereto as Exhibit F is the City Assessor's assessed evaluation of the State Theater building from 1993 through 2000.

14. Attached hereto as Exhibit G is the same evaluation for the Historic Orpheum Theater, one block away.

15. Attached hereto as Exhibit H is the same evaluation for the Skyway Theater one block away in another direction.

16. Your affiant executes this affidavit in support of Plaintiff's attached motion for summary judgment.

_____

Patricia DaCunha

Subscribed and sworn to before
me this_____day of February, 2000

_____

Notary Public

Hennepin Theatre District Schedule

Updated 02/02/00

Historic State Theatre

805 Hennepin Avenue, Minneapolis

2000

01/25-01/30	**"Joseph and the Amazing Technicolor Dreamcoat"*** $60.00-$25.00
02/11	**"Dream Theater & The Dixie Dregs"** $32.50/$30.50
02/13	**"Weird Al Yankovich"** $27.50/$22.50
02/15-02/20	**"Art"*** $50.00-$19.00
02/24 & 02/25	**"Lyle Lovett"** $37.50/$33.50
03/02	**American Express Financial Advisors** NON-TICKETED
03/03	**"The Flatlanders"** $28.50/$23.50
03/16	**Target Store's Spring Meeting** NON-TICKETED

Historic Orpheum Theatre

910 Hennepin Avenue, Minneapolis

2000

02/04	**"Jamie Foxx"** $40.50/$30.50
02/12	**"Luis Miguel"** $77.00/$52.00/$37.00
02/14	**"The Isley Brothers"** $52.00/$39.50/$34.50
02/18	**"Marc Anthony"** $49.50/$36.50/$31.50
02/20	**"L.F.O."** $20.00
02/23	**"The Pretenders"** $32.00
02/24 & 02/25	**"The Kids in the Hall"** $36.50/$31.50
02/26	**"Chris Tucker"** $47.00/$42.00/$37.00
03/04	**"Brian McKnight"** $49.50/$37.00
03/05	**"Jars of Clay"** $23.50
04/12-04/23	**"Fosse"*** $60.00-$25.00
05/16-05/28	**"Titanic"*** $62.00-$27.00

Music Box Theater

1407 Nicollet Avenue, Minneapolis

"Triple Espresso"

Now Playing through 04/02/00

$32.50/$28.50

Groups of 15 or more call 373-5665 for possible discount!

Hey City Theater

824 Hennepin Avenue, Minneapolis

"Tony and Tina's Wedding"

Now Playing

$60.00-$42.00

Groups of 15 or more call 339-1399 for possible discount!

For tickets over the phone for Broadway shows (noted with a *) please call the TicketMaster Artsline at (612) 673-0404

For tickets to all other shows, please call the TicketMaster Concert Line at (612) 989-5151

Tickets to upcoming shows are also available at all TicketMaster outlets including: Dayton's, Mervyn's California and Rainbow Foods Stores.

Box Office Hours:

State Theatre: Mon.-Fri. 9:00 a.m.-6:00 p.m.
Sat. and Sun. Noon-5:00 p.m.
Orpheum Theatre: Open @ 3:00 p.m. Day of Show ONLY

Information & Services

ASL/ADS	(612) 373-5650
TDD/TTY	(612) 373-5665
Tickets by Fax	(612) 339-3909
Group Sales (20 or more)	(612) 373-5665
Internet Sales	www.ticketmaster.com
Subscription Sales	(800) 859-SHOW
Theatre Live! Membership Hotline	(612) 373-5699
General Information	(612) 339-7007

Programs, dates and prices are subject to change without notice. Prices include theatre restoration fees where applicable. Additional Service Charges may apply at place of purchase.

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000805 HENNEPIN AV S 12

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
28976			950116	0020	ASLTP	013369	GOA	911	413
28976			950304	1912	RECPRP	056193	RPT	348	1310
28976			950501	2024	DK	115561	DTX	348	DTX1
28976			950506	1400	DK	121176	DTX		DTX1
28976			950510	2127	DAMPRP	125898	RPT		411
28976			950512	2210	MISC	128250	FTC		1330
28976			950902	1932	TLE	268116	ADV		420
28976			951016	1241	DIST	317594	DTX	911	1331
28976			951110	2128	TRANS	343997	AST		411
28976			951114	1724	PD	347648	GOA		992
28976			951127	2054	DK	359884	GOA		466
28976			951205	1610	MISC	366930	INS		410

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000910 HENNEPIN AV S

19

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
27863			950124	2236	PKG	021188	GOA	348	924
27863			950125	2022	ASTOFF	021902	GOA	POL	1350
27863			950202	1433	THEFTA	028908	RPT		T7
27863			950216	2215	SICK	041579	FTC		38
27863			950512	1546	THEFT	127794	RPT		T2
27863			950528	2019	TRANS	146236	INS	911	420
27863			950607	1904	LKOUT	158149	AST		864
27863			950613	0435	UNWANT	164466	SNT	911	411
27863			950803	2144	SUSPP	229786	BKG		420
27863			950804	0916	DAMPRP	230418	RPT		T2
27863			950811	2027	TRANS	240162	AST		1307
27863			950816	1535	UNWANT	246208	SNT	911	410
27863			950819	2004	THEFT	250449	RPT		T7
27863			951109	2040	DK	343000	INS		DTX1
27863			951112	1211	THEFTA	345660	RPT		T2
27863			951112	1513	THEFTA	345778	RPT		T7
27863			951122	2122	MEDIC	355717	FTC		753
27863			951126	1337	SUSPP	358814	INS		407
27863			951126	1358	SUSPP	358829	INS		410

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000918 HENNEPIN AV S 10

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
21769			950107	2356	CUSTRB	006258	BKG	911	420
21769			950205	0812	THEFT	031657	RPT		T2
21769			950205	2241	CUSTRB	032130	BKG	911	421
21769			950212	1103	DOWN	037921	SCK		420
21769			950330	2043	CUSTRB	082043	SNT	911	410
21769			950527	2122	PD	145383	RPT		421
21769			950615	2243	THEFT	167968	RPT	348	421
21769			950703	1232	ASLTP	190046	BKG	911	862
21769			950801	2220	PI	227137	RPT	911	924
21769			950920	0057	UNWANT	288164	CNL	911	420

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000900 HENNEPIN AV S 3

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
23207			950109	1611	DAMPRP	007479	RPT		T6
23207			950414	2209	THEFT	097715	RPT		T7
23207			951223	1814	FIGHTW	381941	RPT	911	1330

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000906 HENNEPIN AV S 5

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
41990			950904	1901	ALRMAB	270388	AOK	348	410
41990			951104	0347	ALRMAB	337388	FAL	348	411
41990			951104	2123	ALRMAB	338065	FAL	348	421
41990			951129	1855	ALRMAB	361429	AOK	348	420
41990			951202	0211	ALRMAB	363722	FAL		410

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000930 HENNEPIN AV S 6

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
9117			950112	0849	UNSBIZ	009812	FAL	911	430
9117			950127	2255	ALRMS	023817	FAL	SNT	420
9117			950325	1823	ALRMS	077196	FAL	SNT	420
9117			950721	1842	ALRMS	213089	FAL	SNT	420
9117			950825	1638	DK	257772	GOA	911	DTX2
9117			951004	1643	UNCON	304343	DTX	911	DTX2

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001104 HENNEPIN AV S 1

		FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
—	252813			950115	0335	TLE	012653	ADV		411

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	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
1258			950117	1639	THEFT	014793	RPT	348	420
1258			950118	2141	THEFTA	015854	RPT		T6
1258			950123	0803	ALRMAB	019714	FAL		410
1258			950124	1939	THEFTA	021014	RPT		T6
1258			950219	1234	PD	044110	ADV	911	420
1258			950302	0105	ALRMAB	053527	FAL	348	421
1258			950313	0414	ALRMAB	064239	FAL	348	413
1258			950427	0740	ALRMAB	110503	FAL	348	412
1258			950812	1238	DAMPRP	241083	RPT		T2

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001138 HENNEPIN AV S 5

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
171278			950108	1335	THEFT	006648	RPT		T2
171278			950713	1453	FIGHT	202592	ADV	911	410
171278			950719	1804	DIST	210337	BKG	911	420
171278			950725	1352	UNWANT	217866	GOA		420
171278			950922	1456	THEFT	290631	RPT		T7

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001140 HENNEPIN AV S 1

FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
226700		951118	0038	DABUSE	351067	BKG		3406

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001142 HENNEPIN AV S 1

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
230062			950308	1049	MEDIC	059335	SNT	911	420

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001146 HENNEPIN AV S 6

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
194459			950105	1912	ROBBIZ	004122	RPT	911	412
194459			950116	1452	SUSPP	013803	GOA		410
194459			950318	1417	ROBBIZ	069938	RPT	911	420
194459			950806	0951	THEFT	233247	RPT		T4
194459			950925	1731	THEFT	294213	ADV		420
194459			951213	1924	THEFT	373241	RPT	348	420

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001150 HENNEPIN AV S

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
163345			950115	0139	THEFTA	012576	RPT	911	412
163345		2103	950119	0135	DIST	016061	AQT	348	420
163345		1107	950131	2150	OD	027448	RPT	911	765
163345			950202	1333	SUSPP	028857	BKG	911	481
163345			950208	2132	MISC	034657	SNT	911	420
163345		1804	950215	0030	UNWANT	040029	CNL	911	411
163345			950222	2354	RECPRP	047191	RPT		1544
163345		1408	950314	2251	UNWANT	066078	UNF	348	421
163345			950318	1432	BURGD	069942	RPT		T1
163345			950323	1953	UNWANT	075145	DTX	911	715
163345			950327	1207	DAMPRP	078762	RPT		T3
163345		909	950329	1438	BURGD	080735	RPT	348	410
163345			950329	2112	UNWANT	081072	GOA	911	420
163345			950331	0200	RECPRP	082379	RPT	348	411
163345		909	950331	2344	CKWEL	083268	AST	911	420
163345			950401	2026	DK	084229	INS		DTX1
163345			950416	0341	SUSPP	099201	INF		421
163345			950416	0752	SUSPP	099279	SNT		412
163345		1405	950506	1451	DIST	121208	ADV	911	420
163345			950511	1051	THEFTA	126413	RPT		T7
163345		1308	950513	0259	ASUIC	128707	AST		759
163345			950516	1609	CKWEL	132436	GOA	911	422
163345			950517	2359	DAMPRP	133963	RPT		T7
163345			950518	0858	MISC	134344	RPT		T2
163345			950530	0307	SHOTS	147688	AQT	911	421
163345			950530	2346	DOWN	148687	SNT	911	413
163345			950603	1438	DABUSE	153079	RPT		410
163345			950607	1535	ASLT	157936	RPT		T6
163345		909	950616	1808	UNKTRB	168858	AST	911	410
163345			950623	1842	THEFT	177725	RPT		T3
163345			950623	2131	DK	177964	AST	911	DTX1
163345			950627	2013	DK	182920	DTX	911	DTX1
163345			950630	1227	DABUSE	186390	RPT		T3
163345			950712	1442	THEFTA	201379	RPT		T2
163345			950719	1214	CKWEL	210018	AOK	911	410
163345		606	950725	2239	UNWANT	218441	NOS	911	421
163345			950811	1827	PINR	240034	GOA	911	420
163345		1505	950811	2220	MISC	240331	FTC	911	411
163345			950812	1323	THEFTA	241126	RPT		T2
163345			950812	1745	THEFT	241340	RPT		T4
163345			950820	1314	THEFTA	251461	RPT		T7
163345			950825	1209	THEFT	257439	RPT		T2
163345			950906	2129	TRANS	273038	AST		840
163345	4		950907	0129	UNCON	273300	AST		421
163345			950913	0759	PDMR	280361	RPT		422
163345			950914	2325	MISC	282366	AST	911	420
163345			950919	0835	THEFTA	287309	RPT		T2
163345			950926	1943	THEFT	295238	RPT		T7
163345			950929	1833	UNWANT	298632	DTX	911	420

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163345		951014	1525	DK	315790	DTX	911	DTX1
163345		951014	2230	THEFT	316149	RPT		T6
163345		951017	0027	SLUMP	318258	AOK	911	420
163345	902	951017	1253	CKWEL	318668	SNT	911	420
163345		951023	1132	AUTOTH	325041	RPT		T4
163345	2106	951030	0958	THEFTA	332272	RPT		420
163345		951031	1120	THEFTA	333376	RPT		T4
163345	1809	951031	1839	RETPRP	333795	ADV	911	410
163345		951106	1431	THEFT	339746	RPT		T7
163345		951108	2243	UNWANT	342158	BKG	911	421
163345		951111	2101	BOOK	345054	BKG		3409
163345	902	951113	2035	UNWANT	346899	SNT	911	421
163345	1308	951119	0318	DABUSE	352346	BKG	911	411
163345		951125	2207	THEFTA	358265	RPT		T7
163345		951128	0838	THEFTA	360186	RPT		T2
163345	806	951215	0239	DABUSE	374416	BKG	911	421
163345		951217	1612	THEFT	376746	RPT		T7

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001152 HENNEPIN AV S 1

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
252746			950112	2223	DOMES	010379	INF	911	241
252746			950127	1901	ATTPU	023597	BKG	673	210
252746			950204	1355	BURGD	030866	RPT	348	210

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	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
4089			950102	2208	UNWANT	001759	GOA	911	421
4089			950106	2229	PROWL	005229	GOA	348	1350
4089			950107	2100	TLE	006062	TAG		759
4089			950118	1759	TLE	015670	ADV		710
4089			950123	1522	DOWN	019972	DTX	911	DTX1
4089			950127	1907	PD	023595	AST		1307
4089			950130	1639	THEFT	026299	RPT		T6
4089			950202	1213	DK	028802	DTX		DTX1
4089			950205	1803	DK	031947	DTX	348	420
4089			950209	1548	MISC	035293	AST		422
4089			950303	2108	SUSPV	055218	AOK		710
4089			950304	1047	THEFT	055824	RPT		T2
4089			950304	1537	SUSPP	056017	SNT		715
4089			950308	1512	SUSPP	059504	BKG		1311
4089			950310	1222	SUSPP	061201	TAG		1311
4089			950310	1257	SUSPP	061229	BKG		1311
4089			950316	1642	SUSPP	067854	FTC		1310
4089			950319	0025	PD	070634	RPT		420
4089			950323	1725	DK	074997	DTX		DTX1
4089			950323	2032	CUSTRB	075191	GOA		715
4089			950326	2231	ASLTP	078360	BKG	911	410
4089			950415	2115	DK	098753	DTX		DTX1
4089			950501	1551	DK	115307	DTX	348	DTX1
4089			950505	2230	TLE	120363	ADV		420
4089			950511	1705	SUSPV	126703	GOA		46
4089			950512	2328	FIGHT	128398	BKG		1350
4089			950518	1719	TOW	134706	TOW		1320
4089			950521	2254	PIHR	138789	RPT	911	421
4089			950525	1316	SUSPP	142491	TAG		1331
4089			950603	1703	UNCON	153217	AST	911	420
4089			950614	2027	DIST	166441	GOA	911	1307
4089			950615	1525	FIGHT	167379	BKG		1311
4089			950616	1901	SUSPV	168931	ADV		1350
4089			950701	2203	TLE	188236	TAG		410
4089			950704	1836	DK	191816	AST	911	DTX1
4089			950720	1626	PD	211539	UNF		1331
4089			950729	1530	CUSTRB	222893	CNL	911	420
4089			950804	2124	TRANS	231160	AST		421
4089			950815	1339	SUSPP	244749	TAG		1331
4089			950819	2314	DK	250734	PEM		422
4089			950819	2314	DK	250734	GOA		422
4089			950822	0900	THEFT	253641	RPT		T2
4089			950828	1807	TLE	261657	BKG		420
4089			950901	2209	SUSPP	266918	FTC		704
4089			950908	1835	DOMES	275000	RPD		924
4089			950908	2025	TLE	275122	ADV		420
4089			950905	2255	FIGHT	271965	GOA	911	420
4089			950912	0939	THEFT	279247	RPT		T4
4089			950916	2332	RECPRP	284957	FTC		1320

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4089	950917	0008	DIST	285013	AST		1307
4089	950922	1911	DK	290862	AST		1545
4089	951006	2116	DIST	306847	BKG		1543
4089	951007	2308	ROBPER	308216	BKG		441
4089	951021	1855	ASLT	323389	AST	911	420
4089	951027	2025	DK	329571	DTX		DTX1
4089	951028	2111	DIST	330743	SNT		782
4089	951031	1330	SUSPP	333486	FTC		1321
4089	951105	1754	UNWANT	338919	GOA	911	420
4089	951116	1301	DK	349367	DTX	911	DTX1
4089	951118	2302	FIGHT	352071	SNT		1340
4089	951124	1553	SUSPP	356999	TAG		1311
4089	951128	1934	FIGHT	360645	BKG	911	1340
4089	951130	2104	CKWEL	362433	AST	911	420
4089	951202	1606	DK	364160	AST	911	DTX1
4089	951202	1634	SUSPP	364177	GOA		1320
4089	951202	1846	DK	364281	CNL	911	DTX1
4089	951202	1846	DK	364281	INS	911	1320
4089	951205	1937	DK	367141	INS		DTX1
4089	951211	1533	DAMPRP	371581	AST	911	410
4089	951215	1707	CUSTRB	374907	SNT		1350
4089	951215	1749	UNWANT	374945	CNL	911	1350
4089	951220	2026	DK	379426	DTX		420
4089	951227	1747	ALRMA	384851	FAL		420
4089	951230	1656	FIGHT	387797	RPT	911	487

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000715 HENNEPIN AV S 4

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
890			950311	1840	MISC	062654	TAG		1310
890			950402	2125	TLE	085458	TAG		413
890			950408	1826	BOOK	091391	BKG		1310
890			950902	2222	TLE	268360	TAG		410

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000721 HENNEPIN AV S

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
16685			950420	1818	SUSPP	103501	SNT		1310

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000723 HENNEPIN AV S 13

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
75432			950113	1911	SUSPP	011179	SNT		410
75432			950201	2244	DIST	028372	ADV		420
75432			950202	1417	SUSPP	028897	BKG		1331
75432			950325	2037	SUSPP	077319	SNT		1330
75432			950401	1419	SUSPP	083883	SNT		712
75432			950408	2239	TLE	091689	TOW		935
75432			950408	2315	BOOK	091736	BKG		935
75432			950610	2103	TLE	161626	SNT		422
75432			950625	1745	KIDTRB	180378	CNL		420
75432			950714	2225	DOWN	204409	GOA		1340
75432			950726	1044	SUSPP	218884	BKG		410
75432			950907	2213	SUSPP	274190	SNT		411
75432			950907	2213	DIST	274192	FTC		1330

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O00725 HENNEPIN AV S 25

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
10880			950105	2308	DK	004325	DTX	911	412
10880			950202	2233	DOWN	029304	DTX	911	413
10880			950219	1020	AUTOTH	044060	RPT	911	422
10880			950315	1423	SUSPP	066626	FTC		1321
10880			950324	1952	UNWANT	076209	AST		40
10880			950324	1952	UNWANT	076209	SNT		1340
10880			950326	0034	SUSPP	077597	PEM		1350
10880			950415	1921	SUSPP	098647	FTC		1350
10880			950417	1836	DIST	100529	GOA	911	DTX1
10880			950602	1705	SUSPP	151753	BKG		1311
10880			950618	2112	LKIN	171795	CNL	911	466
10880			950624	1957	SUSPP	179279	AST		1304
10880			950711	2142	SUSPP	200591	DTX		1320
10880			950805	1652	DIST	232318	GOA	911	420
10880			950816	1858	CUSTRB	246431	CNL	911	412
10880			950816	1858	CUSTRB	246431	AST	911	410
10880			950827	2004	SUSPP	260709	GOA	911	420
10880			950910	0051	ASLT	276834	RPT	911	410
10880			950911	2301	CUSTRB	278924	GOA	911	412
10880			950920	2040	DK	288900	AST		1340
10880			951031	2337	CKWEL	334094	SCK	911	1350
10880			951121	2226	FIGHT	354839	BKG	911	1340
10880			951204	2342	CUSTRB	366345	GOA	911	411
10880			951223	2211	THEFT	382136	RPT		1350
10880			951223	2211	THEFT	382136	AST		404

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001227 HENNEPIN AV S 13

	FLR	APT	DATE	TIME	NATURE	CCN	DISP	SOURCE	UNIT
11288			950203	1819	THEFT	030045	GOA	911	420
11288			950528	1306	ALRMAB	145958	FAL		764
11288		2B	950601	2052	ALRMAR	150781	CNL		410
11288			950608	0206	ALRMAB	158550	FAL	348	411
11288			950709	2133	UNKTRB	198193	GOA	911	413
11288			950709	2133	UNKTRB	198193	AST	911	411
11288			950910	1003	THEFT	277200	RPT		T2
11288			951001	0613	UNWANT	300725	SNT	911	411
11288			951016	0855	BURGD	317464	RPT		T3
11288			951018	1848	SUSPP	320063	GOA	911	422
11288		4D	951104	0843	BURGD	337486	RPT	911	420
11288			951117	1111	THEFT	350282	RPT		T2
11288			951219	0913	SUSPP	378168	NOS	911	420

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AP132T006017APR1999  9904                Select
                  GENERAL PARCEL INFORMATION INQUIRY SCREEN-PBLC              PMQ
    PIN  27  029  24  12  0123
ADDRESS  801-09                  HENNEPIN      AVE       CONDO
   USE CODE CLT  THEATER                          DOWNTOWN WEST
                                              BORIS, DANIEL T                673-2385
 LOT 002 BLK 001 ATL 01B LAND MAP 2033 DST 04    45.60 X       AREA     20472
  4233 LASALLE PLAZA
              VALUES NOT FINALIZED FOR 2000
    PAY     VALUES SUBJECT TO CHANGE UNTIL AFTER EACH YEAR'S BOARD OF REVIEW
    PRP L H C----------------- EMV -----------------     PERMIT  PCT COM DEP USE
 YR  TY V S G     LAND STRUCTURE MACHINERY      TOTAL      ADD    H S      ID
2000 C  E N                                                                00 00 CLT
1999 C  E N     2110000    915000             3025000                      05 76 CLT
1998 C  E N     1940000    910000             2850000                      23 81 CLT
1997 C  E N     1360000    940000             2300000                      05 76 CLT
1996 C  E N     1275000    925000             2200000                      05 76 CLT
1995 C  E N     1275000    925000             2200000                      18 76 CLT
1994 C  E N     1445000    755000             2200000                      05 76 CLT
1993 C  E N     1530000    720000             2250000                      23 76 CLT
                                                        GBA       44616
  MULTI BUILDING PARCEL                                 SQFT      22308
  SEE SCREEN AP120 FOR  TXPAYER NAME                    2ND        2820
PETITION ON FILE  NO  CRT                    BUILDING AGE       1920      XMT ●
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AP132T006017APR1999  9904                Select
                  GENERAL PARCEL INFORMATION INQUIRY SCREEN-PBLC              PMQ
   PIN  27  029  24  21  0030
DDRESS  910                    HENNEPIN      AVE       CONDO
  USE CODE CLT  THEATER                          DOWNTOWN WEST
                                              BORIS, DANIEL T              673-2385
LOT      BLK     ATL 01B LAND MAP 2025 DST 04    36.00 X 270   AREA     40855
 86 70 AUDITORS SUBD NO 126
              VALUES NOT FINALIZED FOR 2000
   PAY    VALUES SUBJECT TO CHANGE UNTIL AFTER EACH YEAR'S BOARD OF REVIEW
   PRP L H C----------------- EMV -----------------     PERMIT  PCT COM DEP USE
YR   TY V S G      LAND STRUCTURE MACHINERY     TOTAL      ADD     H S      ID
000  C  E N                                                                00 00 CLT
999  C  E N    2073000    780000              2853000                      09 81 CLT
998  C  E N    1190000    770000              1960000                      05 82 CLT
997  C  E N    1190000    770000              1960000                      00 00 CLT
996  C  E N    1190000    770000              1960000                      00 00 CLT
995  C  E N    1190000    770000              1960000                      00 00 CLT
994  C  E N    1190000    770000              1960000                      09 76 CLT
993  C  E N     955000    770000              1725000                      00 00 CLT
                                                        GBA      48104
                                                        SQFT     26932
 SEE SCREEN AP120 FOR  TXPAYER NAME                     2ND      19352
ETITION ON FILE  NO  CRT                  BUILDING AGE      1921        XMT ●
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AP132T006017APR1999  9904              Select
                GENERAL PARCEL INFORMATION INQUIRY SCREEN-PBLC              PMQ
    PIN  22  029  24  43  0083
ADDRESS  711-25                  HENNEPIN       AVE       CONDO
   USE CODE CLT  THEATER                        DOWNTOWN WEST
                                          BORIS, DANIEL T                671-2385
 LOT      BLK 223 ATL 01B LAND MAP 2033 DST 04   175.00 X 146   AREA     25550
  9870 HOAG AND BELLS ADDN
           VALUES NOT FINALIZED FOR 2000
    PAY    VALUES SUBJECT TO CHANGE UNTIL AFTER EACH YEAR'S BOARD OF REVIEW
    PRP L H C---------------- EMV ----------------     PERMIT  PCT COM DEP USE
 YR  TY V S G      LAND STRUCTURE MACHINERY     TOTAL     ADD    H S      ID
2000 C  5 N                                                              00  00 CLT
1999 C  5 N    2750000      1000              2751000                    09  81 CLT
1998 C  5 N    2125000      1000              2126000                    09  81 CLT
1997 C  5 N    1970000      1000              1971000                    09  00 CLT
1996 CC 5 N    1420000    480000              1900000                    00  00 CLT
1995 CC 5 N    1420000    480000              1900000                    05  76 CLT
1994 CC 5 N    1420000    480000              1900000                    05  76 CLT
1993 CC 5 N    1725000    175000              1900000                    05  76 CLT
                                                      GBA      137200
                                                      SQFT      36050
  SEE SCREEN AP120 FOR  TXPAYER NAME                  2ND       25550
PETITION ON FILE  9927525                  BUILDING AGE        1972      IMT
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UNITED STATE DISTRICT COURT
DISTRICT OF MINNESOTA

BZAPS, Inc., d/b/a
Buster's Bar,

Plaintiff,

AFFIDAVIT OF NANCY METZGER

vs.

City of Mankato,
a municipal corporation,

Court File No.
98-2588PAM/JGL

Defendant.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Nancy Metzger, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is employed as a paralegal by Manahan & Bluth, one of the attorneys for Plaintiff in the above-entitled matter.

2. Your affiant has been assigned several responsibilities concerning the above-entitled matter.

3. One of those responsibilities was to obtain, from the public records of Defendant City of Mankato, the number and nature of police calls received concerning Mettler's Bar a

licensed liquor establishment in the City of Mankato, which regularly features semi-nude dance entertainment, and compare those to the number and nature of police calls received by all other licensed liquor establishments, which do not feature such entertainment.

4. The results of said investigation are attached as Exhibit A.

5. Your affiant was also asked to investigate the appearance, on an occasional basis, of live semi-nude or nude dance entertainment at various other locations within the City of Mankato.

6. Pursuant to this investigation, your affiant ascertained that a group known as the "Chippendales," a nationally-known male dance revue, featuring partial nudity, has performed on various occasions over the years at the Kato Center, located at 200 Chestnut Street in Mankato.

7. The Kato Center is anything but an adult entertainment facility; it regularly features live entertainment of a family-oriented nature. A copy of a list of the entertainment featured at the Kato Center during calendar year 1999, obtained by your affiant from the Kato Center, is attached hereto as Exhibit B.

8. Your affiant ascertained that the Chippendales performed at the Kato Center an September 26, 1985. A copy of the Mankato Free Press advertising for such event, dated September 12, 1985, is attached hereto as Exhibit C.

9. The Chippendales appeared again at the Kato Center on November 28, 1985. A copy of the advertisement for their performance, appearing in the Mankato Free Press on November 15, 1985, is attached hereto as Exhibit D.

10. The Chippendales appeared most recently at the Kato Center on April 29, 1999. A copy of the advertisement of said performance, appearing in the Mankato Free Press, is attached hereto as Exhibit E.

11. Your affiant has also noted that the Albatross, located in University Square in the City of Mankato, on November 17, 1999, featured an all male revue, of former Chippendale dancers on November 17, 1999. A copy of the advertisement is attached hereto as Exhibit F.

12. Your affiant executes this affidavit in support of Plaintiff's motion for summary judgment.

s/_____
Nancy Metzger

Subscribed and sworn to before
me this 2nd day of February, 2000

s/ Jill A. Hanson
Notary Public

Supreme Court U.S.
FILED
APR 10 2002
OFFICE OF THE CLERK

No. 01-1318

In The

Supreme Court of the United States

BZAPS, INC.,

Petitioner,

vs.

CITY OF MANKATO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT CITY OF MANKATO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES J. THOMSON
Counsel of Record
KENNEDY & GRAVEN, CHARTERED
470 Pillsbury Center
200 South Sixth Street
Minneapolis MN 55402
612-337-9300

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May a municipality apply an adult use ordinance that is constitutional on its face to a business that periodically desires to operate as an adult use?

2. May a municipality regulate businesses holding liquor licenses by prohibiting adult uses on the premises of such businesses?

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JURISDICTIONAL STATEMENT

The U.S. Court of Appeals for the Eighth Circuit affirmed the judgment of the U.S. District Court in this matter on October 12, 2001.[1] The Eighth Circuit denied Petitioner's Petition for a Rehearing and a Rehearing en banc on December 5, 2001. Petitioner filed its Petition for Writ of Certiorari to this Court on March 5, 2002.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution: "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech. . . . "

Section 10.83 of the Mankato City Code. (App. E-1)

Section 4.09 of the Mankato City Code. (App. F-1)

STATEMENT OF THE CASE

1. Factual Recitation

Section 10.83 of the Mankato City Code regulates adult uses. (App. E-1) The City Council adopted Section 10.83 as part of a comprehensive amendment to the City's zoning regulations. Before adopting Section 10.83, the City Council and the Planning Commission reviewed studies conducted by the cities of Indianapolis and St.

[1] Petitioner incorrectly noted in its Petition for Writ of Certiorari that the Court of Appeals entered its judgment on October 21, 2001.

Paul and Rochester, Minnesota, dealing with the issue of adverse secondary effects from adult uses. The purpose of Section 10.83 is to regulate the potential adverse secondary characteristics of adult uses and to insure that those adverse secondary effects do not contribute or enhance criminal activity or contribute to the blighting or downgrading of surrounding property. (App. C-1)

Section 10.83 defines adult uses to include specific uses, such as adult bookstores and adult cabarets. (App. E-1) Subd. 1 of Section 10.83 defines adult cabarets to include a business that provides dancing or other live entertainment "if such dancing or other live entertainment is distinguished or characterized by an emphasis on the presentation, display, depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " (App. E-3) Subd. 1 defines the term "Adult Uses – Principal" as a use, business, or establishment "having more than 10% of its stock in trade or floor area allocated to, or more than twenty per cent (20%) of its gross receipts derived from, any adult use." (App. E-2)

Under Section 10.83, adult uses are permitted uses in the B-2 (General Commercial Business District) and the M-1 (Light Industrial District) if they meet other location criteria set forth in the ordinance. (App. E-7) Those location requirements state that adult use principals must be located at least 350 feet from a residential zoning district and 350 feet from other protected uses, such as a day-care center, a library, and a church. (App. E-7)

Petitioner operates Buster's Bar, which is located in the B-1 zoning district in the City. Petitioner has live

bands performing periodically at the bar. The bar is classified as a "drinking establishment" under the City's zoning regulations, and it is therefore a conditional use in the B-1 district. (App. B-1)

In early November 1998, Allan Torkelson, the owner of Buster's, called Paul Vogel, the City's zoning administrator. Mr. Torkelson asked Mr. Vogel if it was possible for the bar to have periodic performances of male dance reviews.[2] (App. B-1) The male dance reviews, including the performance of "Fatal Attraction", were to involve male dancers performing in various stages of nudity.[3] (App. B-1) Mr. Vogel informed Mr. Torkelson that if the performances fell within the definition of an adult use as set forth in the City Code, Buster's would not be allowed to conduct the performances because adult uses were not an allowable use in the B-1 zoning district. (App. B-2)

2. Procedural Posture

In December 1998, Petitioner commenced this action, claiming that the adult use regulations in Section 10.83 of the Mankato City Code were facially unconstitutional and unconstitutional as applied, because they prevented Petitioner from allowing live nude male dancers to perform

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[2] The record reflects that Petitioner indicated to the City that there would be "periodic" performances of the male dance reviews. (App. B-1)

[3] Petitioner has never disputed that the performance by "Fatal Attraction" involves dancing that is distinguished or characterized by an emphasis on the presentation, display, depiction or description of either specified sexual activities or specified anatomical areas.

at Petitioner's bar. (App. B-3) Petitioner also contended that the ordinance was not narrowly tailored to prohibit only those uses designed to produce adverse secondary effects. (App. B-4)

In its answer and counterclaim, the City affirmatively alleged that Section 10.83 was valid and constitutional in all respects. In its counterclaim, the City requested an injunction enjoining Petitioner from allowing the performance of "Fatal Attraction" or any other live dance performance involving the depiction of specified sexual activities or specified anatomical areas, as those terms are defined in Section 10.83. The City further requested a declaratory judgment declaring that Section 10.83 was applicable to the proposed performance of "Fatal Attraction" and that Section 10.83 was constitutional and valid in all respects.

Petitioner moved for a preliminary injunction. By an Order dated January 15, 1999, the United States District Court for the District of Minnesota (The Honorable Paul A. Magnuson) denied Petitioner's motion. (App. C-1) In doing so, the court concluded that Petitioner was not likely to prevail on the merits of its claims because, among other things, "it would be nonsensical if the City could not enforce its ordinances when people choose to disregard them for only one day." (App. C-7)

In October 1999, the City Council adopted an ordinance amending Chapter 4 of the City Code pertaining to liquor licenses. (App. B-4) That amendment added Section 4.09, making it unlawful for the holder of an on-sale liquor license to allow on the licensed premises any adult use as defined in Section 10.83, Subd. 1. (App. F-2)

After the City adopted Section 4.09, Petitioner served an Amended and Supplemental Complaint. (App. B-4) In addition to the issues raised in the original Complaint, the Amended Complaint challenged the constitutionality of Section 4.09. Petitioner also contended that the ordinance was facially unconstitutional and unconstitutional as applied. (App. B-4)

After cross-motions for summary judgment, the District Court entered an order on August 14, 2000 granting summary judgment in favor of the City. (App. B-1) The District Court ruled that the City's adult use ordinance was a content-neutral regulation and that it satisfied all of the elements established by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). (App. B-6) The court also concluded that the ordinance was not unconstitutional as applied to Petitioner's proposal to operate as an adult business for one day. (App. B-9) Finally, the court ruled that Section 4.09 was a valid exercise of the City's police power and therefore complied with the standards set forth by the Supreme Court in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996). (App. B-15)

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court on October 12, 2001. (App. A-1) The Eighth Circuit denied Petitioner's Petition for Rehearing and for Rehearing en banc on December 5, 2001. (App. D-1) Petitioner filed its Petition for Writ of Certiorari to this Court on March 5, 2002.

REASONS FOR DENYING THE WRIT

1. The Eighth Circuit's Decision Upholding the City's Adult Use Ordinance as a Valid Time, Place and Manner Restriction Is Consistent with this Court's Ruling in *City of Renton v. Playtime Theatres, Inc.*

The threshold inquiry in a First Amendment case involving a challenge to a zoning ordinance is whether the legislation is a content-based restriction or a content-neutral time, place, and manner restriction. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994). Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment, while content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communications. In *Renton*, this Court defined "content-neutral" regulations as ones that "are *justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (emphasis in original). Because the stated purpose of the ordinance at issue in *Renton* was to address the secondary effects of adult businesses, this Court concluded that the zoning ordinance was not content-based but rather content-neutral. *Id.*

The second prong of the *Renton* test is to determine whether the ordinance serves a substantial governmental interest. To satisfy this prong, a municipality must show that the ordinance is aimed at the negative secondary

effects of adult uses rather than the content of the speech. A city may rely on the secondary effects studies of other cities as evidence of secondary effects when drafting its ordinances. This Court held in *Renton* that a municipality is *not* required to "conduct new studies or produce evidence independent of that generated by other cities or towns, so long as whatever evidence the municipality relied upon is *reasonably believed* to be relevant to the problem sought to be addressed." *Id.* at 51-52 (emphasis added).

The "reasonably believed" factor in the second prong of the *Renton* test does not require a City to prove negative secondary effects. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000), this Court recently affirmed the evidentiary standard in *Renton* and once again held that cities do not need to prove adverse secondary effects, but rather may rely on the experience of other cities.[4] In *Erie*, this Court upheld an ordinance banning nudity in public places where the city relied on the secondary effects studies of other cities. Citing the "reasonably believed" test from *Renton*, this Court held that

> [b]ecause the nude dancing at Kandyland is of the *same character* as the adult entertainment at issue in *Renton, Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) . . . and *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390 (1972), it was

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[4] Although the Court analyzed the ordinance in *Erie* under the four-part test in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968), the Court noted that "the evidentiary standard described in *Renton* controls here, and Erie meets that standard." *Erie*, 529 U.S. at 297.

> reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* . . . to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.

Erie, 529 U.S. at 296-97, 120 S. Ct. 1382 (emphasis added) (citing *Renton*, 475 U.S. at 51-52, 106 S. Ct. 925). *Erie* confirms that studies upon which cities rely do not have to be directly on point in order to pass the narrow tailoring test. If the adult use is of the same character and a city "reasonably believes" that the activity may cause some of the negative secondary effects set forth in the studies, an ordinance will pass constitutional muster. *See also Young*, 427 U.S. 50 at 71 (an ordinance need not adopt the least restrictive alternative by focusing on the precise adverse effects cited in the studies; a city "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.")

The third prong of the *Renton* test is to determine whether the ordinance provides a reasonable alternative avenue of communication. This prong is satisfied by providing adult uses with a reasonable opportunity to locate within the city. *Renton*, 475 U.S. at 53.

In this case, Petitioner does not dispute that the City's adult use ordinance meets the first and third prongs of the *Renton* test. Section 10.83 does not ban any particular message, but merely regulates the location of adult uses as defined by the ordinance. In addition, there

is no dispute about available locations in the City for adult uses.

Petitioner argues, however, that the City's ordinance does not further a substantial governmental interest and, therefore, fails to meet the second prong of the *Renton* test. In particular, Petitioner argues that the ordinance is not narrowly tailored because the City cannot prove any adverse secondary effects as a result of periodic performances of live nude dancing. However, the contention that the City must prove that adverse secondary effects will occur as a result of an adult use is directly contrary to this Court's ruling in *Renton*. Nothing in *Renton* requires the City to make such a showing.

Taken to its logical conclusion, Petitioner's argument would mean that Petitioner could conduct live stage shows 29 days out of every month, and the City would not be able to enforce its adult use ordinance unless the City could demonstrate that such a business actually caused adverse secondary effects. This is simply not the law. The City may enforce its ordinances even when people choose to disregard them for only one day. This case is no different than a situation where the owner of a vacant lot in a single-family residential district desires to turn the lot into a used car sales lot for one day. For that day, the use of the property is a used car lot, and a city's zoning regulations could prohibit such a use. In this instance, Petitioner's business would constitute a prohibited adult use as defined in the City's ordinance if Petitioner conducted live, nude stage shows one day out of the year or 365 days out of the year.

The record in this case unequivocally establishes that the City complied with the second prong of the *Renton* test when Section 10.83 was adopted. Before adopting that provision, the City Council and the Planning Commission reviewed studies conducted by other cities dealing with the issue of adverse secondary effects of adult uses. The stated purpose of Section 10.83 is to regulate the potential adverse secondary characteristics of adult uses and to insure that those adverse effects do not contribute or enhance criminal activity or contribute to the blighting or downgrading of surrounding property. In fact, the ordinance adopted by the City is almost identical to the ordinance upheld in *Renton*. Thus, the Eighth Circuit properly concluded that the ordinance is constitutional both on its face and as applied to Petitioner.

2. The Eighth Circuit's Decision Does Not Conflict with the Decisions of Other Circuits.

Petitioner contends that this Court should accept review of this case because a conflict exists between the federal circuit courts as to the standard to be followed by municipalities in adopting adult-use regulations under this Court's holding in *City of Renton*. In particular, Petitioner asserts that the Eighth Circuit opinion conflicts with opinions from the Ninth Circuit, the Eleventh Circuit and the Seventh Circuit. *See Tollis, Inc. v. San Bernadino County*, 827 F.2d 1329 (9th Cir. 1987); *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, 532 U.S. 902, 121 S. Ct. 1223 (2001); *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001); *Schultz v. City of Cumberland*, 228 F.3d 831 (7th

Cir. 2000). Contrary to Petitioner's claim, however, the Eighth Circuit's opinion in the present case is consistent with this Court's ruling in *Renton*. The decisions upon which Petitioner relies are either factually distinguishable from the present case or have misapplied the long-standing rule in *Renton*. Thus, the petition for writ of certiorari should be denied.

The primary decisions upon which Petitioner relies are the Ninth Circuit decisions in *Tollis* and *Alameda Books*. Those cases are factually dissimilar from the present case. In *Tollis*, the county enacted an ordinance regulating the distance between adult-oriented businesses and residential property, churches, funeral homes, schools, parks and playgrounds. The ordinance defined an "adult theater" as "structures 'temporarily *or* permanently used for' the presentation of films . . . or live entertainment emphasizing certain specified sexual activities or anatomical areas." *Tollis*, 827 F.2d at 1331 (emphasis added). The County interpreted the ordinance in such a way that a single showing of an adult movie would convert a theater into an adult-oriented business for purposes of the ordinance. The ordinance was challenged as being "unconstitutionally vague on its face because it failed to define the extent of use for showing adult films that would be necessary to render a theater an 'adult business.' " *Id.* at 1333.

Unlike Petitioner's business in the present case, *Tollis* involved a movie theater that was already protected by the First Amendment. Here, Petitioner's business is classified under the City's zoning regulations as a "drinking establishment." A "drinking establishment" is not protected by the First Amendment.

Also, whether the City's ordinance is vague is not an issue before this Court. Section 10.83 of the City's Code clearly defines each adult use and prescribes the allowed locations. Unlike the ordinance in *Tollis*, the definition for "adult-use cabaret" in the City's ordinance does not distinguish between temporary or permanent uses. Petitioner's use of its establishment as an adult-use cabaret is prohibited in the district in which Petitioner is located, regardless of the number of days out of the year it would be operating as such. Further, the City's ordinance imposes penalties for ordinance violations on a daily basis.

Not only is *Tollis* factually distinct from the present case, but the *Tollis* court clearly misapplied the standard under *Renton*. The City does not need to show that Petitioner's use of its establishment as an adult-use cabaret use will indeed produce undesirable secondary effects. The City's reliance on the studies of other communities that found negative secondary effects were caused by businesses of a similar nature is sufficient under *Renton*.

Alameda Books is also distinguishable from the present case. In *Alameda Books*, the City of Los Angeles attempted to regulate a combination adult bookstore/arcade under an ordinance that would permit either an adult bookstore or an adult arcade, but not both, at one location. The Ninth Circuit struck down the ordinance because the city relied on *no* study concluding that a combination bookstore/arcade would produce negative secondary effects. In contrast, the City in this case relied on several relevant secondary effects studies when adopting its adult use zoning regulations.

The final two cases upon which Petitioner relies are also irrelevant to this case. In *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), the court considered a county regulation banning nude dancing in establishments that serve liquor. The ordinance did not involve a zoning restriction. Thus, the adverse secondary effects from proximity to churches, schools, and other specific land uses were not at issue. The court did, however, look at the county's basis for the regulations in targeting the undesirable secondary effects of adult entertainment establishments that serve alcohol. The court found the ordinance unconstitutional because the County conducted its own studies on specific areas. Those studies indicated no adverse secondary effects, but the County rejected those conclusions in favor of studies from different cities and different time periods.

Finally, Petitioner's reliance on the Seventh Circuit decision in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir., 2000) is also misplaced for a variety of reasons. First, the case involved provisions in the city's ordinance regulating nudity, not a zoning regulation. The court held that the provision in the ordinance banning full nudity within sexually oriented businesses was constitutional, but the provision of the ordinance banning certain sexually explicit movements was unconstitutional because it prevented a "protected form of expression." *Schultz*, 228 F.3d at 847-48. The other issues in *Schultz* were whether a section of the ordinance was overbroad and whether certain licensing provisions were unconstitutional prior restraints on expression.

This Court has already settled the question of the proper standard for cities to follow when adopting zoning ordinances that regulate the location of adult businesses. The rule established in *Renton* needs no further clarification by this Court, and the Eighth Circuit's decision in this case is consistent with *Renton*.

3. The Eighth Circuit's Decision Does Not Conflict with this Court's Decision in *44 Liquormart, Inc. v. Rhode Island*.

Petitioner argues that this Court should grant certiorari in order to address unanswered questions left by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996) concerning the government's ability to regulate sexually explicit entertainment in the absence of secondary effects. However, Petitioner incorrectly interprets the holding and applicability of *44 Liquormart*. Contrary to Petitioner's assertion, this Court did not overrule *California v. LaRue* in *44 Liquormart*. Accordingly, the City's ordinance regulating adult uses at liquor establishments is valid and constitutional in all respects.

In *California v. LaRue*, 409 U.S. 109, 114, 93 S. Ct. 390, 395 (1972) this Court upheld, as a valid exercise of the general police power, an ordinance prohibiting nude dancing where liquor was sold. In doing so, this Court relied in part on the Twenty-first Amendment and found that a municipality's conclusion "that certain sexual performances and the dispensing of liquor by the drink ought not to occur at premises that have licenses was not an irrational one." *Id.* at 118, 93 S. Ct. at 397. Since *LaRue*, this Court and other federal courts, have consistently

upheld ordinances banning nude dancing at liquor establishments. *See Newport v. Iacobucci*, 479 U.S. 92, 107 S. Ct. 383 (1986); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599 (1981); *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998); *International Eateries of America v. Broward County*, 941 F.2d 1157, 1162 (11th Cir. 1991); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *J & B Entertainment v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *D & G Restaurant v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

This Court recently reaffirmed the precedential value of *LaRue* in *44 Liquormart*. In *44 Liquormart*, this Court invalidated a state statute prohibiting advertisement of liquor prices and rejected the contention that the Twenty-first Amendment overrode the First Amendment. However, this Court explicitly stated that it did not question the holding in *LaRue* and, in fact, noted that "the Court's analysis in *LaRue* would have led to precisely the same result even if it had placed no reliance on the Twenty-first Amendment." *44 Liquormart*, 517 U.S. at 515. All nine justices agreed with the portion of the opinion concluding that the *LaRue* holding is still valid. In fact, Justice O'Connor's concurring opinion, which was joined by three other justices, points out that the *LaRue* decision has been consistently followed by other Supreme Court decisions. *Id.* at 533, 116 S. Ct. at 1523. Justice O'Connor concluded that the Court of Appeals' reliance on *LaRue* was misplaced only because the Twenty-first Amendment was not relevant to a case involving commercial speech.

Petitioner argues, essentially, that *44 Liquormart* requires that a city's ordinance regulating the sale of

liquor at adult establishments is only valid if it is "narrowly tailored" to uses shown to cause adverse secondary effects. In other words, regulation of nude entertainment in liquor establishments must now be judged by the same constitutional tests as nude dance entertainment in non-liquor establishments. This argument is without merit. Unlike the ordinance at issue in *44 Liquormart*, the City's ordinance in the present case does not prohibit activity protected by the First Amendment. Rather, the City's ordinance merely regulates such activity by stating that it cannot be conducted at premises holding liquor licenses. Contrary to Petitioner's argument, *44 Liquormart* confirms that ordinances regulating adult uses in liquor establishments are a valid exercise of the police power and do not need to be analyzed under the factors set forth in *City of Renton* or *Barnes*. *44 Liquormart*, 517 U.S. at 515, 116 S. Ct. at 1514. (States "inherent police powers" provide ample authority to prohibit the sale of alcoholic beverages in appropriate locations.)

To support its argument that liquor regulations must be justified under a "secondary effects" theory, Petitioner relies on *Lounge Management Ltd. v. Town of Trenton*, 580 N.W.2d 156 (Wis. 1998); *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001); and *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000). All of these decisions are distinguishable from the present case and none of them support Petitioner's position.

First, in *Lounge Management*, the ordinance involved was a general public nudity ordinance. The Wisconsin Supreme Court invalidated the ordinance, not because

the city exceeded the scope of its police powers in enacting the ordinance, but because the ordinance was overbroad. *Lounge Management*, 580 N.W.2d at 164. It did so because the ordinance, unlike the ordinance in this case, did not regulate just nude dancing – it prohibited all public nudity. *Id.* at 161. The substantial overbreadth principle relied upon by the court in *Lounge Management* is not an issue here.

Also contrary to Petitioner's assertion, the *Stroh* decision does not support Petitioner's position with respect to the City's liquor regulation. *Stroh* is distinguishable from this case for at least three significant reasons. First, the First Amendment principle that was at stake in *Stroh* was an art exhibit, not live nude dancing. Art exhibits are traditionally recognized as one of the most fundamental principles protected by the First Amendment, as compared to live nude dancing, which is only "marginally" protected by the First Amendment. *Barnes v. Glen Theatre, Inc.*, 510 U.S. 560, 566, 111 S. Ct. 2456, 2460 (1991). The second factual distinction between *Stroh* and this case is that in *Stroh* the applicant was not proposing to sell liquor in the area where the art exhibit and trade show were to take place.

Stroh is also legally distinguishable from this case because in *Stroh* the defendants' decision to prohibit the art exhibit was clearly based on their authority to regulate alcohol, not, as in this case, on a municipality's general police powers. The Ninth Circuit stated that the Supreme Court "made clear in *44 Liquormart* that the Twenty-first Amendment does not authorize states to enact liquor regulations that would otherwise be prevented by the First Amendment in other contexts." *Stroh*,

205 F.3d at 1159. In the present case, the findings that were adopted by the City Council when Section 4.09 was enacted clearly indicate that the City was acting pursuant to its general police powers. Nothing in *Stroh* stands for the proposition that a municipality, by virtue of its general police power authority, is precluded from regulating adult uses in liquor establishments. As indicated above, virtually every court that has addressed this issue, both before and after *44 Liquormart,* has upheld a municipality's authority to regulate adult uses in liquor establishments.

Finally, Petitioner's reliance on *Flanigan's* is also misplaced. The ordinance in *Flanigan's* involved a total ban on nude dancing in establishments that serve liquor. *Flanigan's Enterprises,* 242 F.3d at 974. Thus, the court analyzed the county ordinance as a content-neutral regulation under this Court's test set forth in *O'Brien,* rather than as an exercise of the police power as contemplated by *LaRue* and *44 Liquormart.* In addition, the Eleventh Circuit agreed with the district court that the power to prohibit the sale of alcoholic beverages in inappropriate locations is the "inherent police power of every state." *Id.* at 974, n. 9.

In this case, the City adopted the ordinance prohibiting liquor at adult establishments pursuant to its police powers. The Council's findings expressly state that the ordinance is not meant to regulate the content of activities protected by the First Amendment. Thus, the Eighth Circuit correctly found that Section 4.09 is a valid exercise of the City's police powers under *LaRue* and *44 Liquormart.*

Petitioner incorrectly interprets and applies this Court's holding in *44 Liquormart*. This Court does not need to grant review to clarify any unanswered questions with respect to the impact of *44 Liquormart*.

CONCLUSION

Petitioner has not demonstrated any compelling reasons for this Court to exercise its discretion in favor of granting the petition. The Eighth Circuit decision is consistent with previous rulings from this Court and does not conflict with decisions from other circuits. The City respectfully requests that the Court deny the petition.

Dated April 10, 2002.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
MAY 31 2002
CLERK

No. 01-1318

In The
Supreme Court of the United States

BZAPS, INC.,

Petitioner,

vs.

CITY OF MANKATO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This Supplemental Brief is submitted pursuant to Supreme Court Rule 15.8 to respond to Petitioner's Supplemental Brief with respect to the Court's recent decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. ___, 122 S.Ct. 1728 (2002).

ARGUMENT

This Court's decision in *Alameda Books* has no bearing on this case and, contrary to Petitioner's contention, does not constitute the basis for either granting certiorari to review the Eighth Circuit decision on the merits or to grant certiorari and remand the case to the Eighth Circuit.

Alameda Books involved an amendment to Los Angeles' adult establishment ordinance that prohibited more than one adult entertainment business in the same building. 122 S.Ct. at 1731. In enacting its original adult establishment ordinance, the city relied only on its own 1977 study of adult businesses. *Id.* at 1732. That study concluded that concentrations of adult businesses produced higher rates of crimes. *Id.*

In *Alameda Books*, the district court granted summary judgment to the plaintiffs on the basis that the city's ordinance was a content-based regulation of speech that failed the strict scrutiny test. *Id.* at 1733. The Ninth Circuit affirmed, but on different grounds. It held that even if the amendment to the city's adult establishment ordinance was content neutral, the city failed to demonstrate that the regulation was designed to serve a substantial governmental interest. *Id.* Specifically, the Ninth

Circuit found that the city failed to produce evidence upon which it could reasonably rely to demonstrate a link between multiple adult businesses in the same establishments and negative secondary effects. *Id.*

The plurality opinion in *Alameda Books* affirmed the principle established in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986). If a city establishes that its ordinance serves an important government interest, the city does not need to establish that some other type of regulation might also serve that interest. *Id.* at 1736. The Court "specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech." *Id.* The plurality decision essentially restates the principle articulated in *Renton*.

In his concurring opinion, Justice Kennedy concluded that *Renton* requires an intermediate level of review, not strict scrutiny. Justice Kennedy concluded that the ordinance was not invalid on its face and therefore should have survived summary judgment.

Petitioner places much weight on the fact that the City's zoning administrator testified in his deposition that the City had no evidence that periodic performances of nude dancing would cause adverse secondary effects. Petitioner's arguments are misguided. The reason why the zoning administrator testified the way he did is that, unlike Los Angeles, the City had never done its own study. Rather, the City relied on studies done by other cities. The City had no empirical data of its own and, as the Court held in *Renton*, was not required to do its own empirical study.

The studies relied upon by the City when it adopted its ordinance clearly supported the conclusion that adult

cabarets caused adverse secondary effects. Petitioner cannot escape from the ordinance simply by claiming that it only wants to "periodically" operate an adult cabaret. Such an exception would make a mockery of the ordinance. It would, for example, allow the typical neighborhood convenience store to convert into an adult bookstore every Saturday because the City had not shown that operating an adult bookstore one day a week caused adverse secondary effects.

Petitioner apparently concedes that it cannot operate an adult cabaret on a year-round basis. The reason for that is that the studies relied upon by the City clearly demonstrate that those types of businesses have the potential to cause adverse secondary effects. Nevertheless, Petitioner contends that the City must demonstrate by empirical evidence that periodically operating a business as an adult cabaret would have the potential for causing adverse secondary effects. Nothing in *Renton* or *Alameda Books* supports that argument.

The issue in this case is whether a business can ignore the City's constitutionally valid adult use ordinance by only periodically operating as an adult use. The Eighth Circuit correctly concluded that the facts in *Alameda Books* were not relevant to this case. (A-5) The reason for that conclusion was that in this case, unlike *Alameda Books*, the City relied upon evidence directly relating to the adverse effects of nude dancing and could therefore reasonably conclude that periodic performances of nude dancing would have the similar effects. (A-6) The Eighth Circuit also correctly concluded that the City's ordinance

on its face differed in no relevant respect from the ordinance upheld in *Renton*. (A-3)

CONCLUSION

Alameda Books has no impact on this Court's decision on the petition for writ of certiorari. The City respectfully requests that the Court deny the petition.

Dated May 31, 2002

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 20 2002
OFFICE OF THE CLERK

No.01-1318

IN THE
SUPREME COURT OF THE UNITED STATES

BZAPS, Inc., a Minnesota corporation,

Petitioner,

vs.

City of Mankato, a municipal corporation,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This supplemental brief is submitted pursuant to Supreme Court Rule 15.8, on the basis of a new case, recently decided, not available at the time of Petitioner's last filing.

ARGUMENT

On May 13. 2002, this Court decided *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.____(May 13, 2002). Although the decision in that case ultimately favored the City of Los Angeles, over the adults-only video store/arcade challenging the ordinance in question, it is clear from the plurality, concurring, and dissenting opinions that the proper disposition of the above-entitled matter would be to grant the writ of certiorari, vacate the judgment below, and remand the matter for reconsideration in light of *Alameda Books.*

Of key importance is the following language from the plurality opinion of Justice O'Connor concerning the evidentiary burden upon municipalities to justify adult entertainment zoning ordinances under a "secondary effects" theory:

> "In *Renton*,...[w]e held that municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest [Citations omitted.] This is not to say that a municipality can get

> away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." [Citation omitted.] Slip opinion at pp. 10-11.[1]

Judged by the foregoing evidentiary standard, Petitioner's entitlement to relief is clear.

1To be sure, this standard clearly represents only the stated view of four justices, to-wit: Justices O'Connor, Chief Justice Rehnquist, Justice Scalia and Justice Thomas. However, it is clear that the four dissenting Justices, Souter, Stevens, Ginsburg, and Breyer, would require a far more stringent evidentiary showing on the part of government. See for example, slip opinion at pp. 6-7, Souter J. dissenting. Consequently, it is clear that the foregoing quotation from the plurality opinion represents the bare minimum which a majority of this Court would require in order to justify an adult entertainment regulation premised on a secondary effects theory. It is clearly the standard which now governs the instant case.

To begin with, this case presents precisely the "shoddy data and reasoning" condemned by the plurality opinion in *Alameda Books*. The studies relied upon by the City of Mankato in adopting its initial adult entertainment zoning ordinance where the very studies demonstrated to be woefully inadequate to support any causal connection between adult entertainment and adverse secondary effects in the amicus briefs of the First Amendment Lawyers Association submitted in both *Alameda Books* and *City of Erie v. Pap's A.M.*, 527 U.S. 277 (2000).[2]

Moreover, even conceiving the validity of said studies for some purposes, the city's own planning director conceding that none of the studies demonstrated that a single showing of sexually explicit live entertainment at an otherwise non-adult entertainment venue would lead to any adverse secondary effects; indeed, he conceded that the city had no evidence from any jurisdiction anywhere in the United States that this was the case.[3] He further admitted that the municipality's own

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2The findings appended to the FALA amicus briefs were published in a peer reviewed article, Paul, Linz & Shafer, Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm.L & P. 355 (2001).

3See Petitioner's Appendix at G-5-G.14.

experience with existing adult entertainment establishments, which featured adult entertainment on a full-time basis, was that none had caused any adverse secondary effects and that absence of such secondary effects were a reason that the city did not amortize out non-conforming uses.

He further admitted that the city's own experience was that other venues outside the adult entertainment zone had, for years, regularly featured single-night performances of a partially nude male review, indistinguishable from the one sought to be hired by Petitioner, and that there was no evidence whatsoever of adverse secondary effects from such performances. Id. at G-21-G-22.

Plainly, under these facts, the city has failed to meet even its initial burden of proof that its evidence must "fairly support the municipality's rationale for its ordinance." *Alameda Books*, Slip opinion at p. 11.

Moreover, it is equally clear that above and beyond these vast deficiencies in the city's proof, Petitioner tendered evidence further disputing the municipality's factual findings, pointing out that within the City of Minneapolis, the Chippendales, a semi-nude dance review, indistinguishable from the performers Petitioners sought to hire, had engaged in a one-night performance at the historic State Theater in Minneapolis, Minnesota, which performance had resulted in no law

enforcement problems whatsoever and no decline in the values of nearby property. Id. at K-1-K-25.

Under the formulation adopted by this Court in *Alameda Books*, the city would have been able to justify its ordinance, only if it came forward with evidence supporting its rationale, something it plainly failed to do.

Obviously, neither the Eighth Circuit nor the United States District Court in the instant case had the benefit of this Court's evidentiary standards adopted in *Alameda Books*. Obviously if they had, they would not have reached the results they did.

Accordingly, in the event that the decision of the Eighth Circuit is not similarly reversed due to the inadequacy of the city's showing under the *Alameda Books* standards, certiorari should be granted, the judgment vacated and the matter remanded for reconsideration in light of the standards adopted in *Alameda Books*.

Respectfully submitted,

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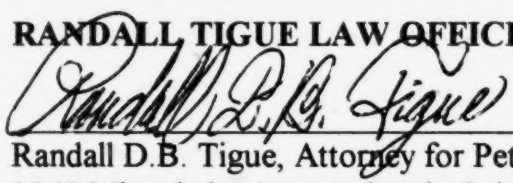

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